CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 26

WEST INDIA OIL COMPANY (PUERTO RICO),
PETITIONER,

vs.

Manuel V.Domenech

~~RAFAEL SANCHIO BONET~~, TREASURER OF
PUERTO RICO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 2, 1940.

CERTIORARI GRANTED APRIL 22, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 26

WEST INDIA OIL COMPANY (PUERTO RICO),
PETITIONER,

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RAFAEL SANCHO BONET, TREASURER OF
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INDEX.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1938.

No. 3501.

WEST INDIA OIL COMPANY (P. R.),
PLAINTIFF, APPELLANT,
v.
R. SANCHO BONET, TREASURER,
DEFENDANT, APPELLEE.

TRANSCRIPT OF RECORD.

[Filed in Circuit Court of Appeals August 1, 1939.]
[Filed in the Supreme Court of Puerto Rico September 20, 1937.]

IN THE DISTRICT COURT FOR THE JUDICIAL DISTRICT OF SAN JUAN, PUERTO RICO.

CIVIL No. 23,715.

WEST INDIA OIL COMPANY (P. R.), PLAINTIFF,
v.
RAFAEL SANCHO BONET, TREASURER OF PUERTO RICO,
DEFENDANT.

DECLARATORY JUDGMENT.

AMENDED PETITION.

Now comes the plaintiff by its undersigned attorneys and respectfully alleges and states:

1. That the plaintiff is a corporation organized under the laws of Puerto Rico, registered in the executive secretary's office, and does business in Puerto Rico; has its principal office in San Juan and engages in the business of importing, purchasing and selling

oil (petroleum) and some of its by-products. That the defendant Rafael Sancho Bonet is the Treasurer of Puerto Rico, was duly appointed and acts as such.

2. That on December 5, 1932, the predecessor in title of the plaintiff established in San Juan, Puerto Rico, under the laws of the United States, and in conformity with a permit obtained from the Custom House Service of the Federal Government a bonded tank for receiving and depositing fuel oil brought from foreign countries, part of which is destined for re-shipment to foreign countries and for use by ships on the high seas in interstate and foreign commerce, and part of which is to be used and consumed in Puerto Rico, and all of said fuel oil—once brought and deposited in the aforesaid bonded tank—being under the absolute authority and control of the United States custom house authorities; the drawing of same being allowed only with the consent and under the supervision of the aforesaid custom authorities of the United States. If said fuel oil is drawn to be used and consumed in Puerto Rico, and thus becomes a subject of commerce in Puerto Rico, the Federal tax must be paid at the time of drawing same, and hence the custody of the Federal Customs Service over the fuel oil so drawn to be sold, used or consumed in Puerto Rico ends, and the importation of this part of the oil also ends; no Federal tax being levied on the fuel oil drawn from said tank for export to foreign countries and for re-shipment for the use of ships on the high seas, beyond the territorial waters of the Island of Puerto Rico.

3. That the plaintiff draws the quantities of said fuel oil from the aforesaid bonded tank for sale and use in the Island of Puerto Rico, its importation thus ends and the Federal tax is paid; the other quantities are drawn with the consent of the Customs Service of the United States, for export to foreign countries and on ships using said fuel oil for their propulsion, on the high seas, beyond the territorial waters of Puerto Rico, and on which no tax is paid under the laws of the United States.

4. That from December, 1932 to August 31, 1935, the plaintiff

d its predecessor in title have drawn from the aforesaid bonded
ık approximately 46 million gallons of fuel oil, which it has ex-
rted from Puerto Rico for the use of ships employing fuel oil
d to be used exclusively on the high seas in interstate and for-
gn commerce, and no part of said oil having been consumed in
e coastwise trade of Puerto Rico.

5. That Section 62 of the Internal Revenue Act of Puerto Rico, amended by Act No. 17 of June 3, 1927, provides:

> "Section 62. There shall be levied and collected, once only, on the sale of any articles the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, and at the time of sale in Porto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale."

That Section 16(a) of the Internal Revenue Act of Puerto Rico, amended by Act No. 17 of June 3, 1927, prescribes:

> "Section 16a. There shall be levied and collected, once only, on all articles included in Section 62 of this Act, a tax of two (2) *per centum ad valorem,* as provided in Section 4 hereof, when said articles are manufactured, produced or introduced in Porto Rico for domestic use or consumption and not for commercial purposes; *Provided,* That said tax shall be levied on articles taxable under this Section as soon as they are manufactured, produced or introduced in Porto Rico for domestic use or consumption; but payment shall be made before said articles are withdrawn from the factory or from the custody of the post office or customs authorities, or from the express or steamship agencies, in such manner as the Treasurer of Porto Rico may by regulation prescribe."

6. That the Treasurer of Puerto Rico, defendant herein, claims at the fuel oil drawn from the aforesaid bonded tank to be used ships on the high seas, as specified under paragraph 4 of this

complaint, is subject to a tax of two percent *ad valorem* under Sections 62 and 16(a) of the Internal Revenue Act of Puerto Rico above quoted, which tax would approximately amount to $26,500, according to the information given to the plaintiff by the defendant; and the plaintiff would be subject to grave losses and inconveniences if it paid the said amount to the defendant without legally having to do so; and hence it applies to this Honorable Court with this declaratory judgment proceeding.

7. That there is no law in Puerto Rico levying a tax on fuel oil imported from foreign countries and destined for re-shipment to foreign countries or for the use of steamers on the high seas, beyond the coastwise trade of Puerto Rico, when said fuel oil is drawn from a bonded tank under the jurisdiction and authority of the Federal Government, inasmuch as the tax levied under Sections 62 and 16(a) of the Internal Revenue Act of Puerto Rico above quoted, is applicable merely to articles sold, manufactured, produced or imported into Puerto Rico for domestic use and consumption, which actually enter the Island and its commerce.

8. That if the aforesaid sections of the Internal Revenue Act are construed in conformity with the claim of the Treasurer and are applied to fuel oil exported for use on the high seas, then said sections are null and void in so far as they tax the fuel oil so exported, for the following reasons:

(a) The fuel oil in question never comes into Puerto Rico nor is merged with the property of the Island, as a bonded tank amounts to a free port, is entirely beyond the control of the Insular Government and, contrary thereto, is absolutely under the control of the United States Government, the said fuel oil never being within the reach of the tax laws of Puerto Rico.

(b) Because the tax so levied is a tax on exports, specifically prohibited by Section 3 of the Organic Act of Puerto Rico.

(c) Because said tax amounts to a direct tax on interstate and foreign commerce, and the Legislature of Puerto Rico lacks power to levy it as such.

(d) Because the fuel oil in controversy herein was still in the course of foreign commerce at the time it was delivered to ships for use on the high seas, the same having been brought to Puerto Rico from foreign countries for said purpose and having remained under the control and authority of the Customs Service of the United States up to the moment in which the same was delivered to said ships.

9. That there being a diversity of opinion between the plaintiff and the defendant with regard to the construction and application of Sections 62 and 16(a) of the Internal Revenue Act of Puerto Rico, the plaintiff prays that this Honorable Court intervene in accordance with the provisions of Act No. 47 of April 25, 1931, so that it may judicially declare the rights and obligations of the parties under the sections of the Internal Revenue Act above quoted.

Wherefore the plaintiff respectfully prays this Honorable Court:

1. That the defendant be summoned in due course.

2. That after a hearing, judgment be rendered holding that the aforesaid Act does not authorize the defendant to tax and collect the two percent *ad valorem* tax on the fuel oil exported by the plaintiff for use on the high seas, as described in paragraph 4 of this complaint.

3. In the alternative, that if Sections 62 and 16(a) tend to authorize the fixing and collection of the two percent *ad valorem* tax on the fuel oil drawn from bonded tanks under the jurisdiction of the Federal Government, for re-shipment and use on the high seas, then that such provisions are null and void in so far as they tax the fuel oil exported for use in the high seas.

4. That the plaintiff be granted any other additional remedy that may be authorized by the aforesaid Act relative to declaratory decrees, approved April 25, 1931, in order that due

compliance be given to whatever judgment may be rendered in favor of the plaintiff.

San Juan, Puerto Rico, September 20, 1935.

JAMES R. BEVERLY,
JOSE LOPEZ BARALT,
Attorneys for the Plaintiff.

VERIFICATION.

I, Dyer W. Ramsey, of legal age, single and resident of San Juan, Puerto Rico, being duly sworn, depose and say:

That my name and personal description are as stated; that I am the president of the West India Oil Company (P. R.); that I have read the foregoing complaint and that each and everyone of the facts alleged therein are true, of my own personal knowledge; that the reason why the deponent is signing this verification is that the plaintiff is a corporation and the undersigned is one of its officers, duly authorized to subscribe this affidavit.

D. W. RAMSEY.

Sworn to and subscribed before me by Dyer W. Ramsey, of legal age, single, resident of San Juan, Puerto Rico, and president of the West India Oil Company (P. R.), to me personally known, this twenty-first day of October, 1935.

R. CASTRO FERNANDEZ,
Notary Public.

Affidavit No. 131.

Copy served this day of October, 1935.

B. FERNANDEZ GARCIA,
ANGEL C. CALDERON,
Attorneys for the Defendant.

[Same title.]

DEMURRER.

Now comes the defendant Rafael Sancho Bonet, as Treasurer of Puerto Rico, by the undersigned Attorney General and Assist-

ant Attorney General of Puerto Rico, and files this demurrer to the petition herein:

That the petition, as drawn, does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

Wherefore the defendant prays this Honorable Court that this demurrer be sustained and that the petition be overruled, with any other legal pronouncement.

San Juan, Puerto Rico, October 7, 1935.

B. FERNANDEZ GARCIA,
Attorney General,

ANGEL C. CALDERON,
Assistant Attorney General.

Copy served this eighth day of October, 1935.

JAMES R. BEVERLY,
Attorney for the Plaintiff.

[Same title.]

ORDER OF DISTRICT COURT, SAN JUAN.

To the amended petition herein the defendant demurred on the ground that the said petition does not state facts sufficient to constitute a cause of action. A declaratory decree is involved and the amended petition substantially alleges as follows: That the predecessors in title of the plaintiff established in this city, under the laws of the United States and after obtaining a license from the Customs Service, a bonded tank for receiving or depositing fuel oil brought from foreign countries, part of which is destined for re-shipment to foreign countries and part to be used by ships on the high seas in the course of interstate and foreign commerce, and part to be used and consumed in Puerto Rico; the said fuel oil being, while the same is deposited in the bonded tank, under the absolute control and authority of the Customs Service of the United States with which consent alone the said fuel oil may be drawn. If the oil is drawn for use in Puerto Rico the Federal tax

has to be paid at the time of drawing same and the custody of the custom house service ends; but the oil exported to foreign countries or for re-shipment for use by ships on the high seas, is not subject to any tax. That the treasurer claims that the fuel oil drawn from said tank for use by ships on the high seas is subject to a tax, in accordance with Sections 62 and 16(a) of the Internal Revenue Act of Puerto Rico; and that there is not in Puerto Rico any law levying a tax on fuel oil coming from foreign countries and destined for re-shipment to other countries or for use by ships on the high seas; that if the two aforesaid sections of the Internal Revenue Act were applicable, as the Treasurer claims, the same would be null and void for the reasons stated by the plaintiff; that there is a diversity of opinion between the plaintiff and the defendant and hence it invokes the intervention of this court in conformity with the provisions of the Act relative to declaratory decrees.

The parties have filed extensive briefs and the Treasurer claims that a question of fact is involved herein and that hence the petition does not lie.

In fact the Act relative to declaratory decrees authorizes the investigation of a fact, when such a thing is necessary to determine the interpretation of a statute, ordinance, contract or franchise (see Sections 2 and 9 of the Act relative to declaratory judgments or decrees). Paragraph 4 of the amended petition establishes a consummate fact, that is, that 46 million gallons of fuel oil have been drawn and that the Treasurer attempts to levy and collect a tax thereon.

We can not see what judicial investigation may be practised on a consummate fact and much less the reason for dismissing a petition, when the same has not been answered, or at least when an appearance raising an issue and stating facts which allow the court to determine whether the decree requested should be granted or not.

A demurrer admits all the facts of a complaint, and, considering them in the light of the decisions, they, in our opinion, state

sufficient facts in favor of the plaintiff to apply for this declaratory judgment.

The demurrer is overruled and the defendant is granted a term of ten days to answer to the amended petition.

Let the parties be notified.

Given at San Juan, Puerto Rico, this sixteenth day of December, 1935.

C. LLAUGER DIAZ, *Judge.*

Copy of the above order was served on the parties this sixteenth day of December, 1935.

J. FIGUEROA, *Clerk.*

[Same title.]

ANSWER.

Now comes the defendant Rafael Sancho Bonet, as Treasurer of Puerto Rico, by the undersigned Attorney General and Assistant Attorney General and, in answer to the above complaint, respectfully states, alleges and prays:

1. The defendant admits each and everyone of the allegations contained in paragraphs 1, 2, 3 and 5.

2. Of the averments of paragraph 4 of the complaint the defendant admits that from December, 1932 to August, 1935, the plaintiff and its predecessor in title have drawn fuel oil from the bonded tank, but denies, for lack of information and belief, that the total number of gallons of fuel oil pumped during said period was 46 millions. The defendant admits moreover that the fuel oil was delivered to ships for use by the latter on the high seas in interstate and foreign commerce. The defendant denies, however, that the fuel oil drawn from the bonded tank during the above period was destined for export, alleging on the contrary that the delivery of the oil to the ships in question amounted simply and exclusively to a sale in Puerto Rico to ships touching in the ports of this Island. The defendant denies for lack of information and belief that any part of said fuel oil has been consumed in the coast-wise trade of Puerto Rico.

From the averments of paragraph 6 of the complaint the defendant admits that the fuel oil drawn from said bonded tank for the use of ships on the high seas, as described in paragraph 4 of the complaint, is subject to the payment of a two percent tax, but denies that this is an *ad valorem* tax under Sections 62 and 16(a) of the Internal Revenue Act, as claimed by the plaintiff, alleging, on the contrary, that the oil so drawn from said bonded tank was to be sold to ships for use on the high seas and that the same is subject, under Section 62 of the Internal Revenue Act, to the two percent tax, as this section levies a tax on the sale of any articles of commerce not taxed by Section 16 of the same Act, or not exempt from taxation under Section 83 of the same Act, at the time of sale in Puerto Rico; the defendant alleges, moreover, that the fuel oil is not taxed by Section 16(a), nor exempt from the payment of the tax under Section 83, and hence, that the sale of said product is subject to the payment of the two percent tax levied by Section 62. The defendant denies that the plaintiff would be subject to serious losses and inconveniences if it paid the tax to which it refers in the complaint and which it claims it is not legally bound to pay. The defendant alleges, on the contrary, that in accordance with the provisions of Section 62 of the Internal Revenue Act, the plaintiff is bound to pay the tax in question and, consequently, no losses or inconveniences could be caused to same. He denies, furthermore, that the plaintiff is entitled to the declaratory judgment prayed for and alleges on the contrary that that is not the adequate remedy, as there is an adequate proceeding under Act No. 8 of 1927.

4. From the averments of paragraph 7 of the complaint the defendant admits that there is no law in Puerto Rico levying a tax on fuel oil brought from foreign countries and destined for reshipment to foreign countries, when the same is drawn from a bonded tank under the jurisdiction and supervision of the Federal Government. The defendant denies that there is no law in Puerto Rico levying a tax on fuel oil brought from foreign countries, drawn from a bonded tank, under the jurisdiction and supervision

of the Federal Government, when said product is delivered for use by ships on the high seas and beyond the coastwise trade of Puerto Rico; alleging on the contrary, that once the fuel oil is drawn and delivered to ships for use anywhere, such delivery amounts to the sale of an article for business purposes and is hence subject to the tax fixed by Section 62 of the Internal Revenue Act, as said section does not say that in order that the tax be applicable to the sale of the article, the same has to be used or consumed in Puerto Rico. The defendant denies, moreover, that Sections 62 and 16(a) of the Internal Revenue Act of Puerto Rico apply solely to articles sold, manufactured, produced or introduced in Puerto Rico for domestic use or consumption and which really enter the Island and its commerce; alleging on the contrary, that Section 16(a) of the Internal Revenue Act does not apply to fuel oil drawn and delivered to ships for use on the high seas or beyond the coastwise trade of Puerto Rico, Section 62 being the only one applicable, as Section 16(a) has nothing to do with the facts averred under the paragraph in question and in the complaint in general.

5. The defendant denies each and everyone of the averments of paragraph 1 of Section 8 of the complaint and subdivisions A, B, C and D thereof, alleging on the contrary, as to the first subdivision, that the defendant has at no time construed jointly Sections 62 and 16(a) of the Internal Revenue Act for purposes of levying the tax to which the complaint refers, as these two sections are separate, independent and apart from each other, Section 62 being the only one applicable, as sales made in Puerto Rico are involved and not exportations, as alleged by the plaintiff.

A. Fuel oil, while in the bonded tank, is beyond the control of the Insular Government, as it is then under the authority and custody of the Federal Government. But as soon as the said fuel oil is drawn from the tank and sold to a ship, the control of the Federal Government over said product ceases, and it is then that the two percent tax fixed by Section 62 of the Internal Revenue Act applies to the sale made by the plaintiff in Puerto Rico. The de-

fendant alleges, besides, that while the fuel oil is in the bonded tank, there is no merger of this product with the property of the Island, but once it is drawn from the bonded tank to be sold to ships within the jurisdictional waters of the Island of Puerto Rico, a confusion of the fuel oil and the property of the Island of Puerto Rico arises.

B. That the tax so levied on the fuel oil in accordance with the provisions of Section 62 of the Internal Revenue Act, does not infringe the provisions of Section 3 of the Organic Act of Puerto Rico, inasmuch as the delivery of said product to ships for their use, does not amount to an export within the real legal meaning of this term, which has been defined as the carrying away of goods from one country to another. The plaintiff, in selling fuel oil to a ship in Puerto Rico, for the use of the latter, is not carrying out an export.

C. The tax in question does not amount to a direct tax on interstate or foreign commerce, inasmuch as the tax in this case has been levied on a sale entirely carried out in Puerto Rico, and interstate and foreign commerce is affected in no wise.

D. That the fuel oil in controversy herein, in so far as that part delivered to ships for their propulsion is concerned, was not in the course of foreign commerce, inasmuch as the same was drawn from the tank solely and exclusively for purposes of a sale, and that act took effect within the territorial limits of the Island of Puerto Rico. The tax provided by Section 62 of the Internal Revenue Act was levied when the control of the Federal Government over the product had already ceased.

6. The defendant denies of paragraph 9 of the complaint that there exist a diversity of opinion between the plaintiff and the defendant in connection with the construction and application of Sections 62 and 16(a) of the Internal Revenue Act of Puerto Rico and, consequently, the intervention of this Honorable Court would lie in conformity with the provisions of Act No. 47 of April 25, 1931, so that the rights and obligations of the parties under the sections of the Internal Revenue Act above quoted be

judicially declared. The defendant denies, on the contrary, that there is no diversity of opinion between the plaintiff and the defendant as regards the interpretation and application of Sections 62 and 16(a) above referred to, in so far as the facts averred in the complaint are concerned, as the latter section has nothing to do with the assessment and collection of the tax which the defendant claims the plaintiff is bound to pay. The duty of the plaintiff to pay the tax in question arises from the provisions of Section 62 and, hence, the discrepancy between these legal precepts exists solely and exclusively in the mind of the plaintiff. There is not, consequently, a real legal controversy under the provisions of Act No. 47 of April 25, 1931, and the declaratory judgment prayed for does not lie. The defendant alleges, furthermore, that there is a plain remedy under Act No. 8 of 1927, which is final and cannot be substituted by the proceeding prescribed by Act No. 47 of 1931.

SPECIAL DEFENSES.

As special defenses the defendant alleges the following:

1. That the petition, as drawn, does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

2. That the issuance of a declaratory decree does not lie when there is another proper remedy at law.

3. Because a declaratory judgment does not lie when a real legal controversy is not involved.

4. Because a declaratory decree does not lie when the order to be entered in favor of the plaintiff or the defendant does not put an end to the controversy in a definite manner.

5. Because the complaint in this case amounts to a moot case, on which a declaratory judgment does not lie.

6. That this court lacks jurisdiction over the subject-matter, inasmuch as the one applicable herein is not Act 47 of 1931, but Act No. 8 of 1927.

Wherefore the defendant respectfully prays this Honorable

Court that the complaint be dismissed, with all other proper pronouncements.

San Juan, Puerto Rico, December 23, 1935.

B. FERNANDEZ GARCIA,
Attorney General.

ANGEL C. CALDERON,
Assistant Attorney General.

Copy served this twenty-fourth day of December, 1935.

JAMES R. BEVERLEY,
Attorney for the Plaintiff.

[Same title.]

STIPULATION.

Now come the parties in the above entitled case by their respective counsel and, for purposes of the hearing, stipulate as follows:

That between December 3, 1932, and August 31, 1935, the plaintiff delivered to ships plying between Puerto Rico and ports of the United States and between Puerto Rico and foreign ports, a quantity of fuel oil amounting to 45,883,530 gallons, the exact determination of this amount being subject to future examinations to be made in the books of the plaintiff; that said fuel oil was deposited in the bunkers of the said steamers and used and consumed by the latter in said trips, and that the sale price of the aforementioned fuel oil was approximately 2.5 per gallon.

San Juan, Puerto Rico, May 4, 1936.

JAMES R. BEVERLY,
Attorney for the Plaintiff,

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico,

ANGEL C. CALDERON,
Assistant Attorney General.

[Same title.]

STATEMENT OF FACTS, OPINION AND JUDGMENT OF DISTRICT COURT, SAN JUAN.

The present petition for a declaratory judgment or decree was filed on September 20, 1935. After several incidents took place—the parties considered the matter as an ordinary suit—the hearing was held on May 4, 1936. It was not, however, until October 2 that the petitioner filed an additional memorandum. From the facts admitted by the parties, it appears that the petitioner is a corporation organized under the laws of Puerto Rico; engages in the business of importing, purchasing and selling petroleum and some of its by-products. On December 5, 1932, the predecessor in title of the plaintiff established in San Juan, under the laws of the United States and after obtaining a license from the customhouse service of the Federal Government, a bonded tank for receiving and depositing fuel oil brought from foreign countries, part of which is destined for re-shipment to foreign countries and part for the use of steamers on the high seas in the course of interstate and foreign commerce, and part for use and consumption in Puerto Rico. The said fuel oil, once brought and deposited in the aforesaid bonded tank, is under the absolute control and authority of the Custom House Service of the United States. It can only be drawn from said tank with the consent and under the supervision of the aforementioned United States customhouse service. If the oil is drawn for use and consumption in Puerto Rico it becomes a subject of commerce in Puerto Rico, the Federal tax is paid at the time the oil is drawn, and the custody of the customhouse service over said fuel oil comes to an end. If the oil is drawn from the tank for export to foreign countries and to be re-shipped for use by ships on the high seas and beyond the territorial waters of Puerto Rico, then no Federal tax is levied on same. Sections 62 and 16(a) of the Internal Revenue Act of Puerto Rico, as amended by Act No. 17 of June 3, 1927, provides as follows:

"Section 62. There shall be levied and collected, once only, on the sale of any articles the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, and at the time of sale in Porto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale."

"Section 16a. There shall be levied and collected, once only, on all articles included in Section 62 of this Act, a tax of two (2) *per centum ad valorem,* as provided in Section 4 hereof, when said articles are manufactured, produced or introduced in Porto Rico for domestic use or consumption and not for commercial purposes; *Provided,* That said tax shall be levied on articles taxable under this section as soon as they are manufactured, produced or introduced in Porto Rico for domestic use or consumption; but payment shall be made before said articles are withdrawn from the factory or from the custody of the post office or customs authorities, or from the express or steamship agencies, in such manner as the Treasurer of Porto Rico may by regulation prescribe."

The facts admitted by the answer go that far.

It was stipulated at the hearing that from December 3, 1932, to August 31, 1935, the plaintiff delivered a quantity of fuel oil amounting to 45,883,530 gallons to steamers plying between Puerto Rico and the United States and foreign ports. The plaintiff alleges that there is no act which levies a tax on fuel oil coming from foreign countries, when said oil has been deposited first, and drawn later, in a bonded tank, under the jurisdiction and supervision of the Federal Government. The diversity of opinion arises from the fact that the plaintiff alleges that the fuel oil drawn from said bonded tank for the use of ships for their propulsion exclusively on the high seas, in the course of interterritorial and foreign commerce, when no part of said fuel oil has been consumed in the coastwise trade of Puerto Rico, is not subject to the two per-

cent *ad valorem* tax fixed by the sections of the aforementioned Act; while the Treasurer maintains that such fuel oil is subject, by virtue of Section 62, to the payment of the two percent tax, as a sale made in Puerto Rico is involved. The plaintiff alleges that if the interpretation given to such sections of the law by the Treasurer of Puerto Rico were upheld, the same would be null and void; (a) because the oil in question never enters the Island of Puerto Rico nor merges with its territorial property, as a bonded tank amounts to a free port and the oil is entirely beyond the control of the Insular Government and under the absolute control of the United States Government; (b) because such tax would be an export duty, specifically prohibited by Section 3 of the Organic Act; (c) because such tax would amount to a direct charge on interstate and foreign commerce, and the Legislature of Puerto Rico has no power to levy the same; and, finally, (d) because the fuel oil in controversy herein was still in the course of foreign commerce at the time it was delivered to ships to be used for their propulsion on the high seas, the same having remained under the control and authority of the Customhouse Service of the United States from the time it arrived in Puerto Rico from foreign countries to the time of its delivery to said ships.

As above stated, the contention of the Treasurer is that once the oil is drawn from the bonded tank to be delivered to ships within the jurisdictional waters of Puerto Rico, a merger arises between the fuel oil and the other property of the plaintiff and, hence, that the oil is subject to the payment of a tax. Based on this diversity of legal construction, the plaintiff prays the court that a declaratory judgment be entered holding: (1) that the assessment and collection of a two percent *ad valorem* tax on the aforesaid fuel oil is not authorized by law; or (2) that if Sections 62 and 16(a) authorize the assessment and collection of such two percent *ad valorem* tax on fuel drawn from bonded tanks, under the jurisdiction of the Federal Government, for re-shipment and use on the high seas, then such tax is null and void, inasmuch as it is levied on oil imported for use on the high seas.

The defendant in an extensive answer sets forth the above theory, and alleges the following, as special defenses:

(a) That the petition does not state facts sufficient to constitute a cause of action; (b) that a declaratory judgment does not lie when there is a proper remedy at law; (c) that a declaratory judgment does not lie when there is no real legal controversy; (d) that a declaratory judgment does not lie when the decree to be entered will not put an end to the controversy; (e) because the complaint in this case sets forth a hypothetical case on which a declaratory judgment does not lie; and, finally, (f) that the court lacks jurisdiction over the subject-matter, inasmuch as the law applicable is Act No. 8 of 1927 and not Act No. 47 of 1931.

During the hearing of the case C. H. Lee testified with regard to the amount of fuel oil delivered; that the sale is made in New York and that if any sale is made in Puerto Rico then both the Federal and the local taxes are paid. The parties have filed extensive briefs in support of their respective contentions. A great many pages of the brief for the defendant are devoted to show that a declaratory judgment does not lie herein, as there is no legal controversy, and, furthermore, because there is an adequate remedy at law, to wit, payment under protest.

This question was considered by us in deciding the demurrer to the original petition or complaint. For a complete investigation of these questions reference is made to the note appearing in *Anway* v. *Grand Rapids R. Co.*, 12 A. L. R. 26. The note to which we refer appears on page 52. Notes on this same question may be found in *Zoercher* v. *Agler*, 70 A. L. R. 1232. But the most recent and most binding authority to us is found in *Texas Company, Inc.* v. *Board of Commissioners*, 49 P. R. R. , wherein is established in a categorical manner that the law on declaratory judgments establishes a simple, adequate and complete remedy for cases of this nature. Under the averments of the complaint we are convinced that there is a controversy between the parties and that the same is of importance, inasmuch as the tax

that the plaintiff would have to pay on the various millions of gallons of fuel oil would amount to a sum in excess of $26,000.

The Treasurer alleges in his brief that the oil delivered to ships for use on the high seas is a sale in Puerto Rico and that as such it is subject to the payment of the tax fixed by law, inasmuch as said tax in no way affects interstate and foreign commerce. He basis his theory in the case of *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, wherein it is held that the territory of Puerto Rico has jurisdiction, for tax purposes, over the ports and navigable waters surrounding the Island of Puerto Rico. He also cites the case of *Eastern Air Transport Inc.* v. *South Carolina Tax Commission,* 285 U. S. 147, where the validity of a statute assessing a tax on gasoline sold for the use of transport planes engaged in interstate commerce was upheld. As may be seen, those cases are not applicable to the one at bar. It is interesting to notice that the defendant in his brief, in discussing the need of upholding the tax, says that if it were decided that fuel oil is not subject to the payment of taxes, that would amount to the allowance of a certain immunity not existing at law, as the bonded tank wherein the fuel oil is deposited would become an instrument to evade the payment of a legal tax, thus depriving The People of Puerto Rico of a tax indispensable to every sovereign government. We dissent from this opinion because, as so often said, the power to tax, no matter how ample its character and extension may be, is necessarily limited to things that are the subject of commerce within the jurisdiction of the state, such subjects being person, property and business. 21 L. Ed. 179. For an illustrative discussion of this principle, see *Commonwealth of Kentucky* v. *Union Pacific R. Co.*, 49 A. L. R. 1091.

Bonded warehouses are under the control of the Federal Government. This is unquestionable and is so admitted by the defendant. It is clear that while fuel oil is deposited in a bonded tank, it is not subject to taxation by the Government of Puerto Rico. It is unquestionable also that if part of the oil is drawn from a bonded tank for the local use and consumption, the same is subject to a

territorial tax. But the question involved herein is whether the oil delivered to ships that use it in plying between the port of San Juan and that of New York or whether the oil exported to foreign countries, should pay the two percent sales tax in conformity with the provisions of Section 62 of the Internal Revenue Act of Puerto Rico. We have already seen from the foregoing that in order for a tax to be valid it is necessary that the subject on which the tax is levied be within the Island of Puerto Rico. As long as the thing which is the object of commerce does not merge with the property of the taxpayer within the territory of Puerto Rico, that thing is beyond the jurisdiction of this government. It is also our opinion that the plaintiff is right in its construction of Sections 16(a) and 62 of our Internal Revenue Act, in so far as it alleges that when the word "sale" is used therein, it should be interpreted as "sale carried out in the Puerto Rican market." The mere fact that the bonded tank is within our territorial waters does not mean that our Legislature has jurisdiction to levy a tax on articles deposited in said bonded tanks. We do not think either that by the mere fact that the articles are deposited there, they have acquired a taxable situs which allows the government of Puerto Rico to levy such tax. In any event, in the interpretation of statutory precepts of a fiscal nature, all doubts should be decided in favor of the taxpayer. Two cases which throw light on this point are *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 74 L. Ed. 109 (1930), and *Standard Oil Co.* v. *California,* 291 U. S. 242 (1934). The first of these cases decides that property stored in a federal reserve is not subject to taxation by the state. The second holds in a categorical manner that a state may not legislate over matters beyond its jurisdiction and apply such legislation to a territory subject to the control of the United States.

The Treasurer's answer, by its attorney, is to the effect that when the oil in question was deposited in the bonded tank it came to rest within our territory and, consequently, that it is subject to the payment of taxes, irrespective of whether it is destined for the local use or consumed by ships on the high seas. How-

ever, the general rule seems to be that when articles of commerce remain under the custody of the customhouse officers, the importation of said articles is not complete. Under these conditions the fuel oil has never been under the absolute control of the importer and in our opinion the territory of Puerto Rico cannot levy the tax fixed by the above fiscal laws, and, consequently, the plaintiff is not bound to pay the tax claimed.

The court holds that under the facts and decisions, the Internal Revenue Act of Puerto Rico does not authorize the defendant to collect the two percent *ad valorem* tax on fuel oil while this oil remains in bonded warehouses, under the absolute control of the Government of the United States through its customhouse service, as the court is of opinion that such bonded tanks are instrumentalities of the Federal Government, and that if the oil never leaves said tanks to merge with the bulk of the property within the territory of Puerto Rico, that the same does not acquire a taxable situs or status in this Island, and consequently, that the same is not subject to taxation. Judgment is rendered in accordance with the terms of this opinion, with costs in favor of the plaintiff, but not including attorneys' fees.

JUDGMENT OF DISTRICT COURT, SAN JUAN.

The court, for the reasons stated in the foregoing opinion, which is made a part hereof, renders judgment holding that under the facts and the decisions, the Internal Revenue Act of Puerto Rico does not authorize the defendant to assess the two percent *ad valorem* tax on fuel oil as long as said oil remains in bonded tanks under the absolute control of the customhouse service of the United States, as the court is of opinion that such bonded tanks are instrumentalities of the Federal Government and that if the oil never leaves said tanks to merge with the bulk of the property within the territory of Puerto Rico, that said oil does not acquire a taxable situs or status within this Island, and, hence, that it is not subject to taxation. Judgment is rendered accordingly, with costs in favor of the plaintiff, but not including attorneys' fees.

Let this judgment be entered and notified to the parties.

Given in San Juan, Puerto Rico, this twenty-eighth day of October, 1936.

C. LLAUGER DIAZ, *Judge.*

Attest: J. FIGUEROA, *Clerk.*

[Same title.]

NOTICE OF APPEAL.

To JAMES R. BEVERLEY, Esq., *Attorney for the Plaintiff, and to* JUAN FIGUEROA, Esq., *Clerk of this Court:*

Please take notice that the defendant in the above entitled case, feeling aggrieved by the judgment rendered by this court on the 28th instant in the above entitled suit—served on the defendant the following day, when copy of the service of the judgment was filed with the record of the case—appeals therefrom in its entirety to the Honorable Supreme Court of Puerto Rico, appealing moreover from the pronouncement of costs against the defendant.

San Juan, Puerto Rico, November 27, 1936.

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico.

R. CORDOVES ARANA,
First Assistant Attorney General.

Copy served this twenty-seventh day of November, 1936.

JAMES R. BEVERLEY,
Attorney for the Plaintiff.

[Same title.]

COUNSEL'S CERTIFICATE OF JUDGMENT ROLL.

We, the undersigned attorneys for the parties, do hereby certify:

That the foregoing judgment roll is a true and faithful copy of its original as the same appears in case No. 23,715 on file in the office of the clerk of the District Court of San Juan, Puerto Rico.

And for purposes of the appeal taken by the defendant from the

order rendered herein, we sign these presents, stating that all the documents above copied are relevant to the appeal taken.

San Juan, Puerto Rico, September 17, 1937.

R. CASTRO FERNANDEZ,
Attorney for the Plaintiff.

ENRIQUE CORDOVA DIAZ,
One of the Attorneys for the Defendant.

True and faithful copy of the preceding judgment roll was received this seventeenth day of September, 1937.

R. CASTRO FERNANDEZ,
Attorney for the Plaintiff.

[Title omitted.]

TRANSCRIPT OF EVIDENCE.

[Filed in the Supreme Court of Puerto Rico September 20, 1937.]

Honorable C. LLAUGER DIAZ, *Judge.*

This case was called for trial in open court on May 4, 1936. The plaintiff appeared by its attorney James R. Beverley and the defendant through Angel C. Calderon, from the office of the Attorney General of Puerto Rico. The Honorable C. Llauger Diaz, judge of this District Court, presided. The following proceedings took place:

Evidence for the Plaintiff.

Sworn testimony of CHARLES H. LEE, Jr.

Q. 1 (by Plaintiff). What is your name? *A.* Charles H. Lee, Jr.

Q. 1*a*. Who do you work for? *A.* For the West India Oil Company (P. R.).

Q. 2. How long have you been in the employ of the West India Oil Company? *A.* Eleven years.

Q. 3. Have you been all that time in Puerto Rico. *A.* No, sir, seven years in Puerto Rico.

Q. 4. What position do you now hold in the West India Oil Company? *A.* Assistant manager.

Q. 5. What is the exact name of the company at present? *A.* West India Oil Company (P. R.).

Q. 6. And this company is the successor of whom? Of the West India Oil Company of New York? *A.* Yes, sir.

Q. 7. In all its rights and obligations? *A.* Yes, sir.

Q. 8. And liabilities? *A.* Yes, sir.

Judge: That has been admitted.

Q. 9. Does the West India and its predecessor in Puerto Rico have a bonded tank for fuel oil? *A.* Yes, sir.

Q. 10. When was that tank bonded? *A.* In December, 1932.

Q. 11. What is the exact date? *A.* December 3.

Q. 12. What was that tank bonded for? *A.* To store fuel oil, which is used largely by the steamers plying between Puerto Rico and the States.

Q. 13. Do you know whether the West India and its predecessor from December 3, 1932 to August 30, 1935, delivered any fuel oil to any steamer for its propulsion on the high seas? *A.* Yes, sir.

Q. 14. Where were the sales of that oil made? *A.* In New York.

Q. 15. Please explain to the court the procedure used in making those sales and deliveries? *A.* The contract is signed in New York between the steamship company and the Standard Oil Company of New York; we receive in Puerto Rico notice of said contracts and we deliver the oil to any steamer belonging to the company which entered into such contract.

Plaintiff: We wish simply to clarify a point. There is a stipulation herein referring to the dates mentioned a few minutes ago, that is, December 3, 1932 and August 31, 1935. The plaintiff delivered to steamers for their use on the high seas 45,883,000 gallons of fuel oil. We just wanted to make this point clear.

Q. 16. The oil to which the stipulation refers is drawn from the bonded tank? *A.* Yes, sir.

Q. 17. All of it? *A.* Yes, sir.

Q. 18. All the fuel oil delivered to the bunkers of the steamers comes from the bonded tank? *A.* Yes, sir, it comes from the bonded tank

Judge: The stipulation of the parties is approved.

Q. 18*a* (by Judge). Do you have any other tanks besides this one? *A.* We have two bonded tanks for fuel oil.

Q. 18*b* (by Judge). And another tank which is not bonded? *A.* Yes, sir.

Q. 18*c* (by Judge). For what do you use the tank which is not bonded? *A.* That is used for local consumption.

Q. 18*d* (by Judge). So that the tank which is not bonded is the one wherein is deposited the fuel oil used for local consumption? *A.* Yes, sir.

Q. 18*e* (by Plaintiff). In whose name are the tanks bonded? *A.* Of the Federal Government, the custom house.

Q. 18*f*. Who controls those tanks? *A.* The custom house.

Q. 18*g*. The Federal custom house? *A.* Yes, sir.

Q. 18*h*. Can you draw oil from that tank without the consent of the Federal Government? *A.* No, sir.

Q. 18*i*. How is that oil controlled? *A.* The Federal Government, the custom house, supervises the receipt by us of the fuel oil, and when delivery to us is complete, the valves of the tanks are strapped or sealed. After that, whenever we wish to draw any oil, we have to call the custom house, they inspect the valves to be sure that the strap or seal was never broken. They supervise the delivery and seal the tank again.

Q. 18*j*. Do they supervise also the amount of fuel oil delivered? *A.* Yes, sir.

Q. 19. Do you have to prepare any reports for them? *A.* They prepare the reports directly.

Q. 20. Do you mean to say that they make their own reports? *A.* Yes, sir.

Q. 21. Where does that oil come from? *A.* From Aruba, Dutch West Indies.

Q. 22. You have testified that the sales were made in New York. Please tell the court where invoices are prepared and payments made. *A.* Invoices and payments are made in New York also.

Q. 23. How does the company bring the fuel oil from Aruba? How is the fuel oil consigned? *A.* Part of it is destined for use by ships, part for export and part for local use, to be consumed in Puerto Rico.

Q. 24. And you have testified that the part destined for the bunkers of the ships is stored in the bonded tank. Where is stored the part destined for foreign countries, the part to be re-exported? *A.* In bonded tanks also.

Q. 25. Does the Federal Government charge a tax on fuel oil destined for and delivered to steamers for their use in the high seas? *A.* No, sir.

Q. 26. Do you know whether there is a general import tax? Custom house duty? *A.* Yes, sir.

Q. 27. How much is it? *A.* One-half cent per gallon.

Q. 28. But this tax is not levied on fuel oil destined to be used by steamers? *A.* No, sir.

Plaintiff: That will be all.

X-Q. 29 (by Defendant). As assistant manager of the West India Oil Company, are you acquainted with the averments of the complaint? *A.* Yes, sir.

X-Q. 30. The forty-five million odd gallons which according to the complaint were delivered to ships for their use. . . . *A.* Yes, sir.

X-Q. 31. These steamers belong to what companies? *A.* To several companies.

X-Q. 32. For example? *A.* For example to the New York & Porto Rico Steamship Company; to the Bull Insular Line; to Compania Transatlantica Espanola.

X-Q. 33. Does the West India Oil Company have anything to do with these steamship companies? Does it own any shares of these steamship companies? *A.* Not as far as I know.

X-Q. 34. It does not? *A.* No, sir.

X-Q. 35. Does the West India Oil Company own a steamship company? *A.* No, sir.

X-Q. 36. Did you say that the fuel oil to which the complaint refers was brought from Aruba? *A.* Yes.

X-Q. 37. Where is the oil deposited? *A.* In San Juan and Ponce.

X-Q. 38. In what place? *A.* In tanks built for that purpose.

X-Q. 39. The forty-five million odd gallons delivered to the steamers were drawn from what tank? *A.* From the tank in San Juan.

X-Q. 40. From one tank, or from more than one tank? *A.* From two tanks.

X-Q. 41. Are these two tanks under the authority of the Federal Government? *A.* Yes, sir.

X-Q. 42. When the fuel oil comes from Aruba, is there anything to indicate that a certain amount is to be used by the local Puerto Rican market; that so much is to be delivered to steamers for their own use and that so much is to be exported? Is that distribution made beforehand, or does the whole amount come in bulk? *A.* When we request a certain amount of fuel oil from the States, we have to state the amount which is to be destined for steamers and the amount to be consumed by the local market, but when the oil comes that does not appear.

X-Q. 43. What amount of fuel oil, more or less, do you import every year? *A.* About 850,000 drums.

X-Q. 44. And every drum has forty-two gallons? *A.* Yes, sir.

X-Q. 45. Which means about how many gallons?

Plaintiff: Did you ask about the number of drums per year?

Witness: Yes, sir.

X-Q. 46. 800,000 drums at forty-two gallons each? *A.* About 33 millions per year.

X-Q. 47. Then during the years 1932, 1933, 1934 and 1935 that amount was received multiplied by 4? *A.* More or less.

X-Q. 48. And of these hundred million gallons, about 45 mil-

lions were delivered to steamers for their use? *A.* Just a minute.

. . .

X-Q. 49. The complaint alleges that 46 million gallons approximately were delivered to steamers. *A.* Yes.

X-Q. 50. Where was the oil delivered? *A.* It was delivered from the tanks in our plant to the bunkers of the steamers.

X-Q. 51. Where are those tanks located? *A.* In Puerta de Tierra.

X-Q. 52. Here in San Juan? *A.* Yes, sir.

X-Q. 53. And the delivery of the 46 million gallons to which the complaint refers, was made in San Juan, Puerto Rico? *A.* Yes, sir.

X-Q. 54. And the fuel oil delivered to those ships, was used by them in their trips between ports of Puerto Rico and the United States? *A.* Yes, sir.

X-Q. 55. This oil was not to be used during trips to other countries? *A.* No, sir.

X-Q. 56. And the oil was not brought from Aruba in transit to other countries? *A.* No, sir.

X-Q. 57. Does this mean that the 46 million gallons of oil were drawn from the tanks that the company has in that manner . . .? *A.* Yes.

X-Q. 58. But the oil was not given away gratis? *A.* No, sir.

X-Q. 59. Then, how was it delivered? *A.* The oil was sold.

X-Q. 60. The tax levied by the Federal Government on that oil, is i fixed on the sale or on the oil?

Judge: What kind of tax is it, a duty or an excise?

Plaintiff: An excise.

Judge: Is it an import duty?

Plaintiff: Exactly, but this is not a competent witness to explain that.

Judge: An import tax?

X-Q. 61. Did you say a moment ago that the West India Oil Company is the successor of whom? *A.* Of the West India Oil Company of New Jersey.

X-Q. 62. Was it such a successor from 1932 to 1935? *A.* A new corporation was organized on January 1, 1935.

X-Q. 63. From January 1, 1935, to the present, what has been the name of the company? *A.* West India Oil Company (P. R.).

X-Q. 64. What does the P. R. mean? Of Puerto Rico? *A.* Yes, sir.

X-Q. 65. Prior to January 1, 1935, and up to the year 1932, what was the name of the company? *A.* West India Oil Company.

X-Q. 66. What was the company then? *A.* A New Jersey corporation.

X-Q. 67. An agent? *A.* An agent of the West India Oil Company of New Jersey.

X-Q. 68. Was this agent duly authorized to deal in those products and to sell them in Puerto Rico? *A.* Yes, sir.

X-Q. 69. Does that mean that during that period the West India Oil Company could draw gasoline (*sic*) from that tank for the local use, and also for export and for delivery to ships?

Judge: The witness said that there is another tank.

X-Q. 70. When you draw oil from that tank for sale in Puerto Rico, do you pay the tax fixed by Section 62 of the Internal Revenue Act? *A.* Yes, sir.

X-Q. 71. And when it is exported? *A.* We don't pay it.

X-Q. 72. And when it is delivered to those ships for their own use, do you pay the tax? *A.* We do not.

X-Q. 73. You testified a while ago that whenever a delivery of oil is made to the steamers, the contract of sale was executed, where? *A.* In New York.

X-Q. 74. And the delivery of the oil is made where? *A.* In San Juan.

X-Q. 75. If I went to your company and ordered one thousand gallons of oil, could you sell me said oil for local use in Puerto Rico? *A.* Of course.

X-Q. 76. Would you have to cable to New York or New Jersey to find out whether the oil could be sold to me? *A.* No, sir.

X-Q. 77. That means that you can sell here without the intervention of the parent corporation?

Defendant: That will be all.

Q. 78 (by Plaintiff). Is all the oil brought from Aruba deposited in the bonded tank? A. No.

Q. 79. What part of the oil is deposited in the bonded tank? A. That is a very hard question.

Q. 80. But part is deposited in the bonded tank and part in other tanks? A. Yes.

Q. 81. Are you entitled to draw from the bonded tanks whatever oil may be needed for local consumption, after paying the tax? A. Yes, sir.

Q. 82. Is the object of the bonded tanks to deposit oil to be sold in Puerto Rico? A. No, the main object of the bonded tanks was to make deliveries to steamers.

Q. 83. Then the oil drawn from the bonded tanks for use in Puerto Rico is something incidental? Is that the main part of the business of the bonded tanks? A. No. In San Juan the main business of the tanks is to make deliveries to steamers.

Q. 84. Do you understand my question? Are the sales for the Puerto Rican market something incidental to those bonded tanks? A. I do not understand.

Plaintiff: All right, I am not going to . . .

X-Q. 85 (by Defendant). One last question. You testified that the sale of fuel oil in Puerto Rico is insignificant. You said that the greater part of this oil is destined for the steamers plying. . . . Could you tell the court the average quantity of oil sold in Puerto Rico from those tanks every year?

Witness: From those tanks?

Defendant: From the oil in those tanks for use in the Puerto Rican market. A. Yes, sir.

X-Q. 86. Is it a large or a small quantity? A. The quantity of oil sold locally?

Defendant: Yes. A. Small.

X-Q. 87. When fuel oil is drawn from those tanks to be sold

in Puerto Rico for use in the local market, does the Federal Government charge a tax? *A.* Yes, sir.

X-Q. 88. And when it is exported? *A.* No, sir.

Defendant: That will be all.

Plaintiff: That is all with the witness. I am not going to offer the next witness because his testimony would be a repetition of what this witness has said.

Defendant: Your Honor, we have here an inspector from the Treasury Department. This witness is going to testify about the number of gallons received and delivered, that is, the same that this witness has testified. We shall not . . .

Plaintiff: Will the court allow us to call the witness again to the stand, for a single question?

Judge: Yes.

Sworn Testimony of CHARLES H. LEE, Jr. (Continued).

Q. 89 (by Plaintiff). When the fuel oil is drawn from the bonded tanks for the use of the steamers on the high seas, that is, for the bunkers of the steamers, where does the custody or vigilance of the Federal Government end? *A.* After all the oil is used.

Q. 90. Explain what you mean by that. *A.* The custom house, before allowing . . . We have to give to the custom house a certificate from the captain or from the first engineer of the steamer showing that the oil has been used on the high seas. We can not claim exemptions without this certificate.

Q. 91. Exemption from the custom house duty? *A.* Yes.

Plaintiff: That will be all.

Defendant: We have no question to propound.

Judge: Is the defendant going to offer any evidence?

Defendant: No, your Honor.

Judge: The court grants the parties a common term of seven days to file briefs.

I, Oscar A. Gandia, reporting stenographer of the District Court for the Judicial District of San Juan, Puerto Rico, hereby certify:

That the foregoing is a true and faithful transcript of the stenographic record taken by me during the hearing of this case. I further certify that I have delivered a certified copy of the above transcript to James R. Beverley, Esq., as attorney for the plaintiff, and to the Honorable Attorney General of Puerto Rico, as attorney for the defendant.

And for purposes of the appeal taken to the Supreme Court of Puerto Rico, I sign these presents in San Juan, Puerto Rico, this twenty-eighth day of July, 1937.

O. A. GANDIA,
Reporting Stenographer, District Court.

Filed in the office of the Clerk of the District Court, July 28, 1937.

M. E. R. *Clerk.*

[Same title.]

JUDGE'S APPROVAL OF THE TRANSCRIPT OF EVIDENCE.

I, C. Llauger Diaz, Judge of the District Court for the Judicial District of San Juan, Puerto Rico, do hereby certify:

That I presided the hearing of this case and that I decided the same; that the foregoing is a true and faithful transcript of the evidence adduced by the parties during the trial of this case, as well as of the objections and exceptions taken by the attorneys for both parties, and of the orders of this court.

And for transmission to the Supreme Court of Puerto Rico, as part of the judgment roll of said case, I sign these presents in San Juan, Puerto Rico, this twentieth day of August, 1937.

C. LLAUGER DIAZ, *Judge.*

Copy served this twenty-third day of August, 1937.

J. FIGUEROA, *Clerk.*

OPINION OF THE COURT.

DELIVERED BY MR. JUSTICE TRAVIESO.

San Juan, Puerto Rico, May 10, 1939.

IN THE SUPREME COURT OF PUERTO RICO

No. 7606.

West India Oil Company (P. R.), Plaintiff and Appellee,

v.

Rafael Sancho Bonet, Treasurer of Puerto Rico, Defendant and Appellant.

Appeal from the District Court of San Juan.
Declaratory Judgment.

This suit was filed under the provisions of Act No. 47 of April 25, 1931, to obtain a declaratory judgment in regard to the rights of the litigants.

The plaintiff, the West India Oil Company (P. R.), is a domestic corporation engaged in importing, purchasing and selling oil and products derived from the same. In connection with said business and to facilitate the sale and delivery of said products to purchasers, the plaintiff set up and maintained a bonded tank in the city of San Juan, Puerto Rico, in keeping with the Federal statutes (46 Stat. 743; 19 U. S. C. A., sec. 1555); said tank was used to receive and deposit fuel oil brought from foreign countries to Puerto Rico. The oil thus deposited remains in the tank for an undetermined period of time until it is (a) re-exported to a foreign country; or (b) delivered to the steamers that purchase it to be used as fuel for their engines; or (c) delivered to purchasers for use in Puerto Rico. While it remains in the bonded tank, the oil is under the control of the Customs Service of the Federal Government.

From December 1932, through August 1935, the plaintiff corporation drew about 46,000,000 gallons of fuel oil from said bonded tank and delivered them to the steamers which had purchased it for use in their trips to the Continent and to foreign countries.

The Treasurer of Puerto Rico maintains that the oil thus delivered to said steamers in Puerto Rico is subject to a tax of 2 percent *ad valorem,* which in the present case amounts to $26,500, more or less. To impose said tax the Treasurer relies on the provisions of Section 62 of the Internal Revenue Act of Puerto Rico, as it was amended by Act No. 17 of June 3, 1927, which reads as follows:

> "Section 62. There shall be levied and collected, once only, on the sale of any articles the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, *and at the time of sale in Porto Rico,* a tax of two (2) percent on the price or value of the daily sales of such articles, *whether such sales are for cash or on credit,* which tax shall be paid at the end of each month *by the person making such sale.*" (Italics supplied.)

The plaintiff corporation maintains that Section 62, *supra,* is not applicable to the oil taken out of the tank and delivered to the steamers, for the following reasons:

1st. Because said oil never enters into Puerto Rico nor does it become property within the territory, since said tank is somewhat in the nature of a *tax-free zone,* not subject to the control of the Insular Government, but under the exclusive control of the Federal Government, said oil never being subject to the tax laws of Puerto Rico.

2nd. Because the tax imposed would be an import tax, prohibited by Section 3 of the Organic Act of Puerto Rico.

3rd. Because said tax is a direct burden on interstate and foreign commerce and as such is not included in the powers of the Insular Legislature.

4th. Because the fuel oil was still in foreign commerce when it was delivered to the steamers for use on the high seas.

The District Court of San Juan decided that said oil had never acquired a taxable *situs* in Puerto Rico and therefore rendered judgment in favor of plaintiff. The defendant appealed. He

alleges that the District Court has erred specifically in upholding each of the four reasons set forth by the plaintiff corporation against the imposition of the tax; and has committed a fifth error, in awarding costs to plaintiff.

To complete the above findings of fact we should state that according to the testimony of Mr. Lee, assistant manager of the plaintiff corporation, the contracts for the sale of oil are signed in New York by the steamship company and the Standard Oil Company of New York; the latter notifies the plaintiff corporation that said contracts have been signed and the oil is delivered by said corporation to any ship of the purchaser steamship line that requests it. Mr. Lee also testified that when a delivery of oil is to be made, the plaintiff notifies the custom's office, which inspects the valves of the tank to see that the seals have not been broken and supervises the delivery and notes the amount delivered; that the bills and payments are made in New York; that when the oil comes from Aruba the amount to be used locally is nowhere stated, nor the amount that is to be delivered to the ships, nor the amount that is to be re-exported, but that it all comes together and is thus deposited in the tanks; that the tanks are situated in the Ward Puerto de Tierra, of San Juan; that when delivery of the oil is made to the ships *the contract of sale is entered into in New York, but the oil is delivered in San Juan.*

1. The lower court in deciding the case accepted as an unquestionable legal doctrine the allegations of the plaintiff corporation that a bonded tank belonging, as in this case, to a private corporation becomes a tax-free zone or a Federal Zone and as such is beyond the control or jurisdiction of the Insular Government, merely because employees of the Federal Government supervise and inspect the deposit and withdrawal of the fuel oil. Having accepted said doctrine the judge of the lower court said:

> "The Bonded Tanks are under the control of the Federal Government. This is indisputable and the defendant accepts it as a fact. It is clear that while the fuel oil is in the Bonded Tank it is not subject to any tax whatsoever by the territory

> of Puerto Rico. . . . We have previously seen that in order that a tax be valid it is necessary that the object taxed be within the Insular jurisdiction. While the object does not become a part of the property of the taxpayer in the Territory of Puerto Rico it is out of the jurisdiction. . . . The mere fact that the tank is within our territorial waters does not mean that our Legislature has jurisdiction to impose a tax on goods deposited in said tanks. We do not think that by the mere fact of being there it has acquired a taxable *situs* which would authorize the Government of Puerto Rico to impose a tax upon it."

Let us examine the jurisprudence cited by the lower court to uphold its decision.

In the case of *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 74 L. Ed. 109, the State of Arkansas imposed a tax on a number of woolen blankets that the corporation Surplus Trading Co. bought from the Government of the United States and which were deposited in a military warehouse at "Camp Pike". Said corporation refused to pay the tax and alleged that "the personal property on which it was laid was located within Camp Pike—an army mobilization, training and supply station of the United States lying within the exterior limits of Pulaski County—the lands in which had been purchased by the United States, with the consent of the legislature of the State, for the purpose of establishing, erecting and maintaining such an army station;" and that the tax laws of the State could not be applied to property so located, being in violation of Article 1, paragraph 8, clause 17, of the Federal Constitution, which gives Congress exclusive jurisdiction over lands bought by the Federal Government with the consent of the State Legislature, for the construction of forts, warehouses, arsenals, docks and other necessary buildings. In deciding that the tax imposed was illegal, the United States Supreme Court stated as follows:

> "It is not unusual for the United States to own within a State lands which are set apart and used for public purposes.

Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal."

The case was decided in favor of the corporation because of the fact that Camp Pike is a military reservation bought by the Federal Government with the consent of the Arkansas Legislature. Referring to military reservations on lands acquired without said consent from the state, the court said:

"If there be private property within such a reservation which is not held or used as an incident of military service it may be subjected to taxation like other private property within the State."

It is evident that the Federal jurisdiction supersedes the state authority and jurisdiction only when the lands have been acquired by the Federal Government for one of the purposes enumerated in Article 1 of the Constitution, *supra,* and when the Legislature of the state has given its consent to the granting and to the surrender of its jurisdiction. See: *Com.* v. *Clary,* 8 Mass. 72; *Mitchell* v. *Tibbetts,* 17 Pick 298; *United States* v. *Cornell,* 2 Mason, 60, Fed. Cas. No. 14,867; *State ex rel. Jones* v. *Mack,* 62 Am. St. Rep. 811; *Ft. Leavenworth R. Co.* v. *Lowe,* 114 U. S. 525; *United States* v. *Unzeuta,* 281 U. S. 138, 74 L. ed. 761.

In the other case cited by the lower court, *Standard Oil Co.* v. *California,* 291 U. S. 242, 78 L. ed. 775, the State of California tried to apply a statute which imposed upon every distributor a tax on every gallon of gasoline "sold and delivered by him within this State", to a certain amount of gasoline sold and delivered by the Standard Oil Company to the Post Exchange of the San Francisco Penitentiary. The Supreme Court of the State upheld the tax. The Supreme Court of the United States reversed the judgment, saying:

"Considering these opinions, it seems plain that by the Act of 1897 California surrendered every possible claim of right to exercise legislative authority within the Presidio—put that area beyond the field of operation of her laws. Accordingly, her Legislature could not lay a tax upon transactions begun and concluded therein.

"A State can not legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States."

See: Note, 74 L. ed. 761.

The case of *United States* v. *Unzeuta, supra,* deals with a murder committed in a freight car within the limits of the military reservation of Fort Robinson, in the State of Nebraska. The Supreme Court upheld the exclusive jurisdiction of the Federal Government and in an opinion written by Chief Justice Hughes stated as follows:

"When the United States acquires title to lands, which are purchased by the consent of the legislature of the State within which they are situated 'for the erection of forts, magazines, arsenals, dockyards and other needful buildings', (Const. Art. I, sec. 8) the Federal jurisdiction is exclusive of all State authority. With reference to land otherwise acquired, this court said in *Fort Leavenworth Railroad Company* v. *Lowe,* 114 U. S. 525, 539, 541, that a different rule applies, that is, that the land and the buildings erected thereon for the uses of the national government will be free from any such interference and jurisdiction of the State, as would impair their effective use for the purposes for which the property was acquired."

See: *People* v. *Suarez,* 51 P. R. R.

Afte a thorough study of the above cited cases we feel bound to declare untenable the contention that a bonded tank belonging to and constructed on private property in Puerto Rico of a corporation, is a tax-free zone or Federal property, over which the

Insular Legislature has no jurisdiction whatsoever, for the only reason that employees of the Customs Service control and inspect the movement of the fuel oil deposited in said tank to facilitate the business of the corporation.

The question that we must consider and decide in this case is not whether or not the Insular Legislature is empowered or whether or not it has jurisdiction to impose a tax on fuel oil while deposited in bond in the tanks of the West India Oil Company. We find no allegation whatsoever in the complaint of said corporation to the effect that the Insular Treasurer has tried to impose such tax. The question before us may be expressed as follows:

Is the Treasurer of Puerto Rico legally authorized to impose and collect the 2 percent tax provided for by Section 62, *supra,* on the price of the fuel oil that the plaintiff corporation bound itself to sell by a contract entered into in New York, which oil was to be delivered at the dock in Puerto Rico by pumping it from the tanks to the ships of the purchaser corporations?

The tax to which Section 62, *supra,* refers is a sales tax that the Treasurer of Puerto Rico is bound to impose and collect once only on the sale of any object of commerce. *Flores Alvarez & Co.* v. *Gallardo,* 36 P. R. R. 105. According to said statute the above tax should be imposed and collected "at the time of sale in Puerto Rico". The decision of the judicial problem which has been brought before us depends for its solution on the interpretation that we give to the phrase "at the time of sale in Puerto Rico".

We accept as an indisputable premise that the fuel oil is an article of commerce the sale of which if it is consummated in Puerto Rico is subject to the payment of the tax. And if the other premise, that is that the sale of the oil was consummated in Puerto Rico, is established, we would be forced to the inevitable conclusion that the Treasurer was correct in applying the statute to it.

The appellee corporation sustains that as the contract of sale was entered into, the bills made and the oil paid for in New York, the sale must be considered *as consummated* in New York

and not in Puerto Rico; and that the fact that at the moment when the sale was carried out the oil was in Puerto Rico, where delivery was made to the purchaser, does not authorize the Treasurer to impose the 2 percent tax on said sale.

The Treasurer argues in opposition that for the purposes of a tax a sale *is consummated* where the delivery of the thing sold is made and that the place where the contract is signed or the price stipulated is paid is of no importance whatsoever.

The complainant corporation has not considered it necessary to show us copies of the contracts entered into in New York between it and the steamship companies. In fact, it has not even referred to said contracts in its amended petition. The fact of the existence of said contracts was first brought forth in the testimony of Mr. Lee, to which we have referred. And if we accept said testimony in its entirety, the only thing that we can get out of it is that they were simple contracts entered into and signed in New York for the sale of a certain amount of fuel oil situated in Puerto Rico, which was to be taken from the tanks of the corporation, measured and delivered at the dock in Puerto Rico to the ships of the purchasers when these should request it.

We have no doubts that the contracts between the oil corporation and the steamship companies were perfected from the moment they were signed in New York, the contracting parties having agreed as to the thing object of the contract and as to the purchase price, without requiring the previous delivery of one or the other. Section 1339 of the Civil Code, 1930 ed. The agreement in regard to the object and the purchase price is sufficient to constitute a valid contract of sale binding as between the purchaser and the vendor, the former having an action to demand the delivery of the thing sold to him and the latter to claim the payment of the price agreed upon.

However, we are not trying to determine the rights and obligations as between the purchaser and the vendor, but the obligation that a vendor who consummates a sale of an object of commerce within the limit of a state enters into with a third party, the state.

Manresa, in his Commentaries to the Spanish Civil Code, in dealing with *the perfection* and *the consummation* of a contract of sale says as follows:

> "From the moment of agreement, and without any other requisite, the contract, we repeat, is perfected and the obligations of the parties arise; but the transmission of the property does not exist until the thing has been delivered. The delivery of the thing refers to the consummation; the section which we are studying merely states the moment in which the contract is perfected. . . .
> We said that the generally accepted rule sustains the doctrine of the transmission of the property merely by agreement and without the necessity of the previous delivery of possession, and that, *on the contrary, our code still requires said requisite to consider the property transmitted.*" (Italics supplied.) 10 Manresa, page 60, 2d ed.

And the Commentator Scaevola says:

> "All these considerations lead us to declare as a consequence *that the transmission of the title of the thing sold from the vendor to the purchaser takes effect at the time when the contract is consummated and not simply when it is perfected.*" (Italics supplied.) 23 Scaevola, 318.

The same doctrine has been upheld by this court in *Olivari* v. *Bartolomei,* 2 Judgments of the Supreme Court of Puerto Rico 79; *Capo* v. *S. A. Panzardi & Co.,* 44 P. R. R. 225; and *Benitez Flores* v. *Llompart,* 50 P. R. R. . See: Section 549 of the Civil Code, 1930 ed.

The jurisprudence in the States is to the same effect:

> "The contract for the presses, while made in New York, was to be executed and consummated in Louisiana. . . . The presses and their appurtenances remained the property of the plaintiff and at their risk until thus tested and accepted. Hence the delivery of the presses was to be accomplished

here. The contract therefore must be held to be a Louisiana contract, and the presses subject to the lien accorded by our law to the vendor." *De la Vergne Refrig. Mach. Co.* v. *New Orleans & W. R. Co.*, 26 S. 455. See: 16 S. 764.

"A sale is deemed to be made at the place where it is executed by a transfer of the property in the goods from the seller to the buyer." 55 C. J. 213.

See: *Fred Miller Brewing Co.* v. *De France*, 57 N. W. 959;
Weil v. *Golden*, 141 Mass. 364, 6 N. E. 229.

"Accordingly, in the absence of any agreement of the parties or any special circumstances to the contrary, if an order is given for goods and is accepted by delivery of the goods to a carrier for shipment with the intention of transferring the property therein to the buyer, *the place of shipment is the place of sale, by the law of which the* sale is governed." 55 C. J. 213. (Italics supplied.)

See: *Peo.* v. *Hill Top Metals M. Co.*, 133 N. E. 303;
Peo. v. *Young*, 237 Ill. 196, 86 N. E. 589;
City of Carthage v. *Duvall*, 202 Ill. 234, 60 N. E. 1092;
Phoenix Packing Co. v. *Humphrey Ball Co.*, 108 Pac. 952;
Claflin v. *Mayer*, 41 La. Ann. 1048, 7 S. 139.

In the present case the title or right of property could not be transmitted to the purchaser until the oil was taken from the tank, measured and delivered to the ships.

"But the acceptance of the delivery order will not transfer the property if something remains to be done, such as weighing or measuring, to identify the goods or ascertain the quantity sold." 55 C. J. 562. See pages 530–542.

See: *Iron City Grain Co.* v. *Arnold*, 215 Ala. 543, 112 So. 123.
Lopez & Moran v. *Sobrinos de Ezquiaga*, 34 P. R. R. 75.

In accordance with the authorities cited we must arrive at the conclusion that the contract or promise of sale entered into in

New York was not consummated until the oil was extracted from the tank, measured and delivered to the ships in their tanks.

The plaintiff corporation argues that in providing that the tax on the sales shall be imposed and collected "at the time of sale in Puerto Rico" the intention of the legislator was to impose and collect a tax when the contract of sale was entered into or perfected and not when the sale is consummated by the delivery of the object.

In the dictionary of the Spanish Language we find the following definitions:

Verify—(From the Latin *verus,* true and facere, to do.) 3. —Realize, effect.

Effect—(From the Latin, *effectus,* effect.) To bring to pass, to execute.

Realize—Verify, to accomplish.

Consummate—To carry out something fully.

It is evident that the verbs "verify", "effect", "realize", and "consummate", all express the same idea or concept: the carrying out or accomplishment of an act.

We are, therefore, of the opinion, and we so decide, that in providing in Section 62, *supra,* that the 2 percent tax shall be imposed and collected "at the time of sale in Puerto Rico" and that said tax shall be paid "by the person *making* such sale", the legislator had the intent to and meant to impose the tax at the place of and at the moment when the sale was consummated by the delivery to the purchaser of the thing sold, without taking the manner of paying the purchase price into consideration, since the tax is made applicable to all sales whether "for cash or on credit". To sustain the opposite would be to make the evasion of the tax a simple matter, in New York as well as in Puerto Rico, since the courts of that state have held that the tax may not be levied when the thing object of the contract is delivered out of the city of New York even though the contract is entered into or signed in said city. *United Artists Corporation* v. *Taylor,* 7 N. E. (2d) 254, 273 N. Y. 334, affirming 248 App. Div. 207.

2. The contention of the plaintiff corporation that the tax levied by the Treasurer on the oil delivered to the ships is an export duty prohibited by Section 3 of the Organic Act of Puerto Rico is in our opinion untenable.

"To export" means to send goods and merchandise from one country to another. "Export" as a noun signifies the object exported. Generally, as used in the Constitution and laws of the United States, the transportation of goods from this country to a foreign country. The term "exportation" is defined in Corpus Juris as follows:

> "A severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country; the act of carrying or sending merchandise abroad . . ." 25 C. J. 217.

In *Swan etc. Co.* v. *United States,* 190 U. S. 143, 47 L. ed. 984, the following was said:

> "It cannot mean simply a carrying out of the country. . . . Nor would the mere fact that there was no purpose of return justify the use of the word 'export'. Coal placed on a steamer in San Francisco to be consumed in propelling that steamer to San Diego would never be so designated. Another country or State as the intended destination of the goods is essential to the idea of exportation."

3. The plaintiff corporation has invoked the commerce clause of the Federal Constitution, alleging that the tax that the Treasurer attempts to levy and collect on the oil delivered in Puerto Rico to the ships "constitutes a direct burden on interstate and foreign commerce and therefore the Legislature of Puerto Rico has no authority to impose said tax".

We have examined the Federal jurisprudence on this point with the following results.

In *Kelley* v. *Rhoads,* 188 U. S. 1, 4 L. ed. 359, the plaintiff was taking his herd of sheep from the Territory of Utah to the State of Nebraska crossing through the State of Wyoming. While

crossing said state, the sheep pastured in the fields along the way. The State of Wyoming imposed and collected a tax from the plaintiff in keeping with a statute that provided that all live stock brought into the state to pasture in its fields should pay a tax for the fiscal year during which it was brought into the state. The plaintiff invoked the protection of the commerce clause and alleged that his sheep were in Wyoming, *in transitu,* as interstate commerce and were not subject to the tax. The Supreme Court so held, and in its opinion, after examining the foregoing jurisprudence, said:

> "The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities. (Citations.) . . .
>
> "The substance of these cases is that, while the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes the subject of interstate commerce and is exempt from local assessment."

In *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 48 L. ed. 538, the plaintiff, a corporation of the State of New Jersey engaged in the manufacturing of wire, nails, etc. in its factories in various states, in order to facilitate the sale and delivery of its products, chose the city of Memphis in the State of Tennessee, as its distribution point. On arriving there its products were deposited in a warehouse of a transportation company which delivered them to the persons to whom the plaintiff sold them. The State of Tennessee levied a tax on said products and the corporation refused to pay it, alleging that the goods were in transit in

Tennessee to be delivered to its customers and that the tax which was being levied was in violation of the commerce clause of the Federal Constitution. The Federal Supreme Court upheld the validity of the tax and said:

> "With these facts in hand we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the Steel Company, to be sold and delivered as contracts for that purpose were completely consummated."

See: *General Oil Co.* v. *Crain*, 209 U. S. 211, 52 L. ed. 754; *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665; *Bacon* v. *Illinois*, 227 U. S. 504; *State* v. *Maxwell Motor Sales Corporation*, 171 N. W. (Minnesota) 566; 61 C. J. 241.

In our opinion the tax which the Treasurer is attempting to levy and collect is not in conflict with the commerce clause of the National Constitution.

4. The fourth and last contention of the plaintiff corporation is that "the fuel oil was still in foreign commerce when it was delivered to the ships to be used on the high seas."

We have hereinbefore stated that the Treasurer did not and does not attempt to levy a sales tax on the fuel oil while it is still deposited in the bonded tank, under the control and supervision of the customs service. If he were attempting such a thing the case would be easy to decide, since such a tax would be a clear violation of Article I, Section 10, Paragraph 3, of the Federal Constitution, which prohibits the States from levying taxes or duties on imports or exports.

The Supreme Court of the United States in *American Steel & Wire Co.* v. *Speed, supra,* clearly established the difference between imports from foreign countries and those from one state to another, saying:

> "Since *Brown* v. *Maryland,* 12 Wheat. 419, 6 L. ed. 684, it

has not been open to question that taxation imposed by the States upon imported goods, whether levied directly on the goods imported or indirectly by burdening the right to dispose of them, is repugnant to that provision of the Constitution providing that 'No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports.' Article I, Sec. 10, paragraph 3. And *Brown* v. *Maryland*, also settled that where goods were imported they preserved their character, as imports, and were therefore not subject to either direct or indirect state taxation *as long as they were unsold in the original packages in which they were imported.* A recent case referring to the authorities and restating this elementary doctrine is *May* v. *New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976. Assuming that the goods concerning which the state taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another State constituted an importation, in the constitutional signification of that word, it is clear they could not be directly or indirectly taxed. But the goods not having been brought from abroad, they were not imported in the legal sense and were subject to state taxation after they had reached their destination and whilst held in the State for sale. . . . The several States, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the States had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the State."

The point involved in *Brown* v. *Maryland, supra,* was whether or not without violating the Constitution a State may impose the condition of taking out a license at a cost of $50 upon an importer of foreign goods before he may sell the goods so imported. The Supreme Court in an opinion of its Chief Justice Mr. Marshall

held that said tax was unconstitutional because it was an import duty. From the opinion of that eminent jurist we copy as follows:

> "But while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the state to tax commences; we cannot admit, that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition. . . .
>
> It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; *but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports , to escape the prohibition in the constitution.*" (Italics supplied.)

Applying the rules established in the cases we have cited to the facts in the present case, we must necessarily hold that when the importer took from the bonded tank a certain number of gallons of oil and delivered them to a ship at the dock in Puerto Rico, to consummate a sale already agreed upon, said sale was subject to the tax levied by Section 62 of the Internal Revenue Law, *supra;* that the oil thus sold, extracted and delivered by the importer lost its character as an import and came into Puerto Rico as an object of commerce and from that moment on was subject to the insular fiscal jurisdiction (*West India Oil Co.* v. *Gallardo,* 6 F. (2d) 523); that the fact that the oil has been delivered to a ship which is going to use it in its trips in interstate or international commerce does not make the oil an export, since said product was not consigned to any foreign or national port (*Swan & Finch Co.* v.

United States, supra); that the mere purchase of supplies or equipment which are to be used in a business in interstate commerce does not so confound said purchase with that business as to exempt it from the payment of the tax levied by the insular law equally on all sales carried out or consummated within its jurisdiction (*Eastern Air Transport* v. *Tax Comm.*, 285 U. S. 147); and finally that as the delivery of the oil was made at the wharf, in the San Juan harbor, the sale was consummated within the fiscal jurisdiction of Puerto Rico and was, therefore, subject to the payment of the 2 percent tax, which being a sales tax is in the nature of an excise tax and not a property tax. (*Gromer* v. *Standard Dredging Co.*, 224 U. S. 362.)

Since no violation of a Federal statute has been invoked which would give ships engaged in interstate or international commerce the privilege of buying, or oil corporations, of selling, within the limits of a state, objects of commerce, without having to pay the local excise taxes on sales carried out within the limits of the state, we must hold that the West India Oil Company is legally bound to pay the sum claimed by the appellant Treasurer. To decide otherwise would be to make the act discriminatory against the other merchants engaged in the same business.

For the above reasons the judgment appealed from should be reversed, without any award of costs.

MARTIN TRAVIESO,
Associate Justice.

[Title omitted.]

JUDGMENT OF SUPREME COURT OF PUERTO RICO.

San Juan, Puerto Rico, May 10, 1939.

For the reasons stated in the foregoing opinion, the judgment appealed from rendered by the District Court of San Juan on October 28, 1936, is hereby reversed, without special pronouncement of costs.

It was thus pronounced and ordered by the court as witness the

signature of the chief justice. Mr. Justice Wolf dissented and Mr. Justice de Jesus took no part in the decision of this case.

EMILIO DEL TORO,
Chief Justice.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[MEMORANDUM: Petition for appeal, dated June 12, 1939; order allowing appeal, June 14, 1939; citation, dated June 15, 1939, returnable within sixty days; cost bond for $300, Fidelity & Deposit Company of Maryland, surety; and order approving cost bond, dated June 15, 1939, are here omitted. A. I. CHARRON, *Clerk.*]

[Title omitted.]

ASSIGNMENT OF ERRORS.

Now comes West India Oil Company (P. R.) and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in this cause from the judgment of this court entered May 10, 1939, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of Puerto Rico in the above entitled case, there is manifest error, to wit:

1. The court erred in holding that fuel oil brought from a foreign country to Puerto Rico and placed in tanks bonded under the authority of the United States Customs laws where it remained under the authority and control of the United States customs authorities, and subsequently transferred from such bonded tanks direct to the bunkers of ships to be used for their propulsion on the high seas in interstate and foreign commerce is subject to the sales tax imposed by Section 62 of Act No. 85 of the Legislature of Puerto Rico approved August 20, 1925 as amended by Act No. 17 approved June 3, 1927.

2. The court erred in holding that fuel oil brought from a foreign country and placed in such bonded tanks under the authority and control of the customs authorities of the United States

and subsequently transferred from such bonded tanks direct to the bunkers of ships for their propulsion on the high seas in interstate and foreign commerce, acquired a situs in Puerto Rico for tax purposes at the moment it is pumped from the said bonded tanks to the bunkers of the ships.

3. The court erred in holding that fuel oil brought from a foreign country and placed in bonded tanks under the authority and control of the United States customs authorities and subsequently transferred from such bonded tanks directly to the bunkers of ships for their propulsion on the high seas in interstate and foreign commerce, enters into Puerto Rico for tax purposes at the moment it is being pumped from the said bonded tanks to the bunkers of ships.

4. The court erred in holding that a contract made in the State of New York for the sale of foreign fuel oil to be delivered to ships' bunkers, from federally bonded tanks in Puerto Rico where it had been deposited upon arrival from a foreign country, for the use of such ships on the high seas in interstate and foreign commerce, is subject to the tax on sales made in Puerto Rico as provided in Section 62 of Act No. 85 of the Legislature of Puerto Rico approved August 20, 1925 as amended by Act No. 17 approved June 3[redacted]27, when bills for said oil are rendered in New York and payment made there, the only act taking place in Puerto Rico being the pumping of such oil from the bonded tanks to the bunkers of the ships.

5. The court erred in holding that a statute taxing sales made in Puerto Rico includes a tax on the delivery of articles sold on a contract made in the State of New York where the accounts for the same were rendered in the State of New York and payment made therein.

6. The court erred in failing and refusing to hold that fuel oil brought from a foreign country and delivered into bonded tanks under the authority and control of the United States customs authorities and subsequently transferred from such tank directly to the bunkers of ships for use on the high seas in interstate and

foreign commerce, had never entered the jurisdiction of Puerto Rico for tax purposes and had never become a part of or mingled with the general mass of property within the Island of Puerto Rico.

7. The court erred in failing and refusing to hold that fuel oil brought to the Island of Puerto Rico from a foreign country and there deposited in bonded tanks under the authority and control of the United States customs authorities and subsequently transferred directly from such tanks to the bunkers of ships for use on the high seas in interstate and foreign commerce, was still in the course of interstate and foreign commerce at the time of such delivery to the ships' bunkers and hence not subject to a Puerto Rican sales tax.

8. The court erred in failing and refusing to hold that a tax on the delivery of fuel oil brought from a foreign country to Puerto Rico and there placed in a bonded tank under the control of the United States customs authorities and subsequently transferred direct to the bunkers of ships for their propulsion in interstate and foreign commerce, constitutes a direct burden on interstate and foreign commerce and as such is beyond the powers of the Legislature of Puerto Rico.

9. The court erred in holding that foreign fuel oil brought to the Island of Puerto Rico and placed in bond and subsequently delivered from bond to ships for consumption on the high seas in interstate and foreign commerce, had come inside the tariff barrier of the United States and had become subject to local taxation on the delivery thereof to the ships.

10. The court erred in holding that the statute taxing sales at the time of sale in Puerto Rico is applicable to a sale made in the State of New York when the physical transfer of the article sold was made from bonded tanks in Puerto Rico under the control of the United States customs authorities to the bunkers of ships engaged in interstate and foreign commerce.

11. For other errors appearing on the record.

Wherefore the plaintiff prays that the judgment herein rendered by the Supreme Court of Puerto Rico be reversed with costs.

JAMES R. BEVERLEY,
R. CASTRO FERNANDEZ,
JOSE LOPEZ BARALT,
Attorneys for WEST INDIA OIL COMPANY (P. R.).

[Title omitted.]

TRANSLATOR'S CERTIFICATE.

I, B. Marrero Rios, official interpreter and translator of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing is a true and faithful translation of their respective originals, as the same appear from the original record of this case on file in this office.

In testimony whereof, I have signed this certificate in the City of San Juan, Puerto Rico, this tenth day of July, 1939.

B. MARRERO RIOS,
Official Interpreter and Translator of the Supreme Court of Puerto Rico.

[Title omitted.]

CLERK'S CERTIFICATE.

I, Joaquin Lopez, secretary-reporter of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing papers and proceedings had in the above entitled case are true and faithful copies of their respective originals as the same appear on file and of record in this office and embodied in this transcript by the appellant, according to the order of the court.

I further certify that the translation of said papers and proceedings has been revised by the official translator and interpreter of this court, as shown by his certificate attached and made a part of this transcript.

In testimony whereof, I have hereunto set my hand and affixed

the seal of this court, in the City of San Juan, Puerto Rico, this twenty-fourth day of July, 1939.

JOAQUIN LOPEZ,

Secretary-Reporter of the
Supreme Court of Puerto Rico.

[$24.75 in cancelled excise tax stamps here attached.]

PROCEEDINGS IN CIRCUIT COURT OF APPEALS.

On October 18, 1939, this cause came on to be heard, and was fully heard by the court, Honorable Scott Wilson and Honorable Calvert Magruder, Circuit Judges, and Honorable Hugh D. McLellan, District Judge, sitting.

Thereafter, to wit, on December 15, 1939, the following Opinion of the Court was filed:

OPINION OF THE COURT.

December 15, 1939.

McLELLAN, J. The question presented by this appeal is whether oil brought to Puerto Rico, deposited in bonded tanks and later pursuant to a contract for its sale drawn off into ships for use therein on the high seas and elsewhere is subject to a sales tax by virtue of the following Puerto Rican statutory provisions:

"Internal Revenue Law of Puerto Rico, as amended by Act No. 17 of June 3, 1927; Laws of 1927, Special Session, pp. 458-486.

"Sec. 62. There shall be levied and collected, once only, on the sale of any article the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, and at the time of sale in Porto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale." (Page 472.)

"Sec. 16 (a). There shall be levied and collected, once only, on all articles included in section 62 of this Act, a tax of two (2) *per centum ad valorem*, as provided in section 4 hereof, when said articles are manufactured, produced or introduced in Porto Rico for domestic use or consumption . . . but payment shall be made before said articles are withdrawn from the factory or from the custody of the post office or customs authorities, or from the express or steamship agencies, in such manner as

the Treasurer of Porto Rico may by regulation prescribe." (Page 484.)

The District Court of San Juan concluded that the transactions in question were not taxable; the Supreme Court of Puerto Rico reversed the District Court's judgment. The pertinent facts may be stated briefly. The appellant, West India Oil Company (P. R.) is a corporation chartered under the laws of Puerto Rico. Having obtained a United States license, it maintained two bonded tanks for receiving and depositing fuel oil brought from foreign countries. When so deposited in a bonded tank the oil is within the joint custody of United States Government Customs officials and the proprietor and can be withdrawn only with the consent of the Customs officials. *Tit. 19 U. S. C. Sec. 1555.* It remains in the tank until it is either exported, delivered to steamers for use for their engines as fuel, or delivered to purchasers for use in Puerto Rico. In the last case, it is entered through customs and the duty paid. In and before August, 1935, the Appellant withdrew and delivered about 46,000,000 gallons of fuel oil from the bonded tanks and delivered it to steamers which had purchased it for use in their voyages to the Continent and to foreign countries.

When oil was to be sold in this way, contracts for its sale were signed in New York by the Standard Oil Company of New York and the purchasing steamers or their owners. The appellant did not put in evidence any such contracts and except for the suggestion that the appellant is one of the New York Company's subsidiaries, all that we know is that the Standard Oil Company of New York notified the appellant of the signing of the contracts, which in turn delivered the oil to the steamers requesting it. When such a delivery is to be made the customs office is notified and the delivery supervised by its officials. In such cases, no duties are exacted by the United States. The oil is thus delivered to the steamers. Bills therefor are presented and paid in New York.

If, as the District Court said, the oil was not subject to local

taxation while in the bonded tanks, a question which we are not called upon to decide, this would not prevent the imposition of a tax upon its sale to the steamers for use in their voyages. The sales tax is not a property tax. It is founded upon Congressional authority given to the Legislature by the Organic Act of Porto Rico, Tit. 48, Section 741, to lay Internal Revenue taxes. It is an excise tax to be levied upon the exercise of a privilege. *Indian Motorcycle Co.* v. *United States,* 283 U. S. 570; *Patton* v. *Brady,* 184 U. S. 608. It falls in the same category with the tax on the manufacturer of sugar discussed in *Loiza* v. *Porto Rico,* 57 F. (2d) 705. No question as to the right to tax property while within the control of the Customs officials is here presented. The tax is upon transactions which involve the release of such control and are consummated contemporaneously with or after such control is relinquished. The power of the Puerto Rican Government to impose a tax of the kind here involved does not seem to us doubtful. And we think the provisions of the statute imposing an ad valorem tax "on the sale of any articles the object of commerce . . . at the time of the sale in Puerto Rico" are applicable. The fact that the consummation of the sales by the delivery of the oil in Puerto Rico was preceded by a contract between the buyers and the Standard Oil Company of New York in that State leads to no different conclusion.

The situs of this tangible and movable personal property was in Puerto Rico. On principle and by the weight of authority title to such chattels passes according to the law of the place where they are. *Beale, The Conflict of Laws,* Sections 255.3 and 255.5 and cases there cited. Such is the rule in New York, where the contract between the Standard Oil Company and the buyers of the oil was made. *D'Ivernois* v. *Leavitt,* 23 Barb. 63. As heretofore intimated we are left in the dark as to the terms of the contracts made in New York. Whatever those terms were, we think upon this Record that title to the oil passed in Puerto Rico and that under the governing principles of the ter-

ritorial law, the transactions here considered are not tax free by reason of the fact that contracts for the sale of the oil were made in New York or the fact that bills therefor were presented and paid in that State. It is unnecessary here to discuss the Sales Act or the Common Law as to the circumstances under which the making of a contract for sale operates to pass the title of the goods before delivery to the buyer. The authorities cited in the opinion of the Insular Supreme Court clearly support the view that in Puerto Rico title to the goods does not pass before delivery to the buyer, and that without such delivery, the sale is not consummated. The decision that within the meaning of the Section of the Internal Revenue Law of Puerto Rico imposing a tax "on the sale of any article of commerce . . . and at the time of the sale in Puerto Rico" the sale does not occur before delivery, involves the construction of a local statute and a consideration of the local Civil Code, derived from the Spanish Code. We have no need here to invoke the well established rule that the decisions of the local Supreme Court interpreting local statutes and laws are entitled to great respect and should be sustained in the absence of clear or manifest error. *Diaz* v. *Gonzalez,* 261 U. S. 102, 105; *Bonet* v. *Yabucoa Sugar Co.,* 306 U. S. 505, 509. The Insular Court's determination that the sales occurred in Puerto Rico and that they were not consummated "until the oil was taken from the tank, measured and delivered to the ships" seems right to us.

It is urged on the appellant's behalf that the transactions at bar are not taxable because of the provision in the Organic Law of Puerto Rico that "no export duties shall be levied or collected. . . ." Tit. 48 U. S. C. Sec. 741. But the fuel oil was not destined for a foreign port. As stated in *Swan & Finch Company* v. *United States,* 190 U. S. 143, "whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country." We do not regard the oil put on board for consumption at sea as

"exports" within the meaning of Section 3 of the Organic Act of Puerto Rico.

Resisting the appellant's contention that the fuel oil was at all times within the channels of foreign and interstate commerce and that a tax on its sale would be a burden on such commerce, the appellee calls our attention to *Lugo* v. *Suazo*, 59 F. (2d) 386, where this court said that "the Commerce Clause does not extend to Puerto Rico". Compare *Inter-Island Steam Navigation Co.* v. *Territory of Hawaii*, 96 F. (2d) 412. But we do not rest our decision here on inapplicability of the Commerce Clause. Assuming without intimating its relevancy, we think the Insular Supreme Court was right in concluding that there was here no such direct burden on commerce as to invalidate the tax. And in view of its opinion in which the authorities are considered, a detailed discussion of this aspect of the case is unnecessary. The appellant in the course of its regular business of selling oil caused some of it to be stored in its own tanks for indefinite periods whence it was sometimes sold for domestic use, sometimes for export and at other times for delivery to ships for consumption at sea. During all the time, though subject to the joint custody of the United States Customs officials, it received the protection of the insular laws. The oil was held for sale and its transportation halted for that purpose. It was then sold or its sale consummated in Insular territory by a domestic corporation, not for export but for use at sea and we discover no valid reason for invalidating an excise tax based on the privilege of conducting such business.

The judgment of the Supreme Court of Puerto Rico is affirmed, with costs to the appellee.

On the same date, to wit, December 15, 1939, the following Judgment was entered:

JUDGMENT.

December 15, 1939.

This cause came on to be heard October 18, 1939, upon the transcript of record of the Supreme Court of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now, to wit, December 15, 1939, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is affirmed, with costs to the appellee.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on January 25, 1940, mandate was stayed until further order of court.

CLERK'S CERTIFICATE.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages, numbered 1 to 60, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including January 30, 1940, in the cause in said court numbered and entitled,

No. 3501.

WEST INDIA OIL COMPANY (P. R.),
PLAINTIFF, APPELLANT,

v.

R. SANCHO BONET, TREASURER,
DEFENDANT, APPELLEE.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this thirtieth day of January, A. D. 1940.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the United ates Circuit Court of Appeals for the First Circuit is anted.

And it is further ordered that the duly certified copy of transcript of the proceedings below which accompanied petition shall be treated as though filed in response to h writ.

(8718)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 782 26

WEST INDIA OIL COMPANY (PUERTO RICO),
Petitioner,

vs.

RAFAEL SANCHO BONET, TREASURER OF PUERTO RICO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND SUPPORTING BRIEF.

JAMES R. BEVERLEY,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 782

WEST INDIA OIL COMPANY (PUERTO RICO),
Petitioner,

vs.

RAFAEL SANCHO BONET, TREASURER OF PUERTO RICO.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, West India Oil Company (Puerto Rico), prays a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in this cause on December 15th, 1939, affirming the judgment of the Supreme Court of Puerto Rico which in turn had reversed the judgment of the District Court of San Juan in favor of petitioner.

The Circuit Court of Appeals affirmed the Supreme Court of Puerto Rico in holding that a sales tax on the sale of foreign fuel oil out of Federally bonded tanks to ships' bunkers in Puerto Rico for use on the high seas is valid, notwithstanding that the oil concerned had not yet been entered through the U. S. Customs and was under the control and

supervision of the United States Customs officers at all times concerned.

Questions Presented.

This petition involves three questions:

1. Whether the sale in New York and delivery within the geographical limits of Puerto Rico to ships' bunkers of foreign fuel oil brought by petitioner to Puerto Rico and stored in Federally bonded tanks under the joint custody of petitioner and the United States Customs officers to await delivery to ships' bunkers, is subject to the tax on sales imposed by Section 62 of Act No. 85 of the Legislature of Puerto Rico approved August 20th, 1925 as amended by Act No. 17 approved June 3rd, 1927.

The Circuit Court of Appeals erroneously assumed in its opinion that the tax involved was "an excise tax based on the privilege of conducting such business". This is incorrect. Business license taxes are provided for in another section of the same taxing act (Section 84 of Act No. 85) which is not in controversy here. The tax here concerned is a straight tax on sales.

2. Whether foreign fuel oil stored in Federally bonded tanks in Puerto Rico to await transfer to ships' bunkers for consumption on the high seas is "exported" within the meaning of the Tariff Act of 1930 (19 U. S. C. A. 1309) and the Revenue Act of 1932 (48 Stat. 256; 26 U. S. C. A., pp. 427-435), and if so, whether such definitions would control in all transactions covering the foreign fuel oil here involved, considering that such fuel oil has never been entered through the United States Customs and remains, while in Puerto Rico, under Customs custody.

3. Whether a Puerto Rico tax on the sale of foreign fuel oil which has never been entered through the Customs, and delivery of which is made in Puerto Rico out of Federally bonded tanks to ships' bunkers for consumption on the high

seas, would constitute a prohibited burden on foreign commerce and on commerce between Puerto Rico and the continental United States.

Summary Statement.

Petitioner is a corporation domestic to Puerto Rico engaged in the handling of petroleum products. So far as the present case is concerned, petitioner brings fuel oil from Aruba, Dutch West Indies, to Puerto Rico and stores it in bonded tanks under Section 555 of the Tariff Act of 1930 (46 Stat. 743, 19 U. S. C. A. 1555). The oil is never entered through the Customs but is either re-exported or is delivered to ships' bunkers for their use on the high seas. Occasionally small amounts are drawn from the bonded tanks for use in Puerto Rico and in such cases this oil is entered through the Customs, the Customs Duty paid and also the Puerto Rican sales tax here involved is paid on such oil. Withdrawal for sale or use in Puerto Rico is negligible (R. 27, 30).

The controversy is as to whether such deliveries of foreign fuel oil out of bonded tanks to ships' bunkers for use on the high seas constitute a transaction taxable under Section 62 of the Internal Revenue Law of Puerto Rico (Act No. 85 of the Legislature of Puerto Rico approved August 20th, 1925 as amended by Act No. 17 approved June 3rd, 1927), which section reads as follows:

> "Section 62. There shall be levied and collected, once only, on the sale of any articles the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, and at the time of sale in Porto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale."

Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals in its opinion treats the tax as applied to the fuel oil here involved as an ordinary excise and erroneously assumes that the taxable act takes place within the jurisdiction of Puerto Rico and is protected by the insular laws, overlooking the fact that although the actual delivery of the fuel oil is made from federally bonded tanks to ships' bunkers within the geographical limits of Puerto Rico, the law governing and controlling and protecting the merchandise at all times is exclusively the Federal law. The Custom officers supervise the delivery from the tanks to the ships and the general supervision of these officers continues so far as possible until the oil is actually consumed at sea (R. 31). The contracts for the sale of the oil are made in New York and payments made there (R. 24, 26).

Petitioner's Position.

The tax is not attacked as discriminatory but as being without the power of Puerto Rico to lay.

Petitioner takes the position that the fuel oil involved in this case, never having been entered through the United States Customs, acquired no *situs* for taxation in Puerto Rico and that as a corollary proposition the Insular Government is without authority to tax any transaction such as sale or delivery, moving such fuel oil in commerce. Such merchandise at no time passed through the tariff barriers of the United States and at no time became a part of the mass of property within the territory and thus subject to the territorial jurisdiction for taxing purposes, whether for excise or property taxes. The situation would be different if the fuel oil had ever been entered through the Customs and had become a part of the mass of prop-

erty within the jurisdiction of Puerto Rico. Then it would have become subject to local property taxes or excises, but so far as the present case is concerned, the oil was never within the jurisdiction of Puerto Rico, and the transaction which moved the oil on board the ship is not subject to local taxation.

Petitioner also contends that at all times the fuel oil involved was subject to the provisions of Section 630 of the Revenue Act of 1932 as amended and that this Federal statute having stated that such ship supplies shall be considered as "exports", the local Insular Government of Puerto Rico is also bound to treat these deliveries as exports so long as the supplies never left the control and custody of the Customs officers. A tax on either imports or exports is forbidden to the Insular Government of Puerto Rico by the Act of Congress of March 2, 1917, known as the Organic Act of Puerto Rico (39 Stat. 953, 48 U. S. C. A. 741.)

To allow Puerto Rico to tax the delivery of this foreign oil to ships' bunkers is to permit the Insular Government to frustrate and defeat the declared purpose of Congress in the Revenue Act of 1932 to exempt ships' fuel oil from tax and to thus encourage the fueling of ships in American ports.

Petitioner also takes the position that the application of the insular tax to the fuel oil here involved would constitute in fact a prohibited burden on interstate and foreign commerce and a duty on tonnage.

Reasons Relied Upon for the Allowance of the Writ.

This case involves an important question in regard to the interrelation of a Puerto Rican taxing statute and certain Federal laws, the Tariff Act of 1930 and the Revenue Act of 1932, and the effect of the latter upon the taxing

powers of Puerto Rico, over transactions moving foreign merchandise under Customs Custody. It also involves the important question as to whether a transaction connected with foreign merchandise which has not yet been entered through the Customs and is still under the custody of the Customs officers can be affected by local taxation. The Supreme Court of Puerto Rico held and the Circuit Court of Appeals confirmed that the "sale" takes place where the foreign oil is physically delivered to the ships. Petitioner maintains that under applicable decisions of this Court, the delivery itself, the consummation of the sale, being under the direct control and supervision of the Customs officials, is outside the taxing jurisdiction of Puerto Rico. The decisions have been uniform in the past that foreign merchandise in Customs Custody is outside the jurisdiction of the State or local government powers. The decision below goes contrary to this accepted rule.

The question of whether a tax on a sale of foreign merchandise which technically has never entered Puerto Rico is an interference with and a burden on interstate and foreign commerce, is an important one. If the merchandise itself had never at any time ended its course of importation and come within the jurisdiction of Puerto Rico, then it would seem that a tax on a transaction which moves this foreign merchandise from a Federally bonded tank to the bunkers of ocean-going ships would present an important question of both local and Federal law which has never been clearly answered. The decision of the Supreme Court of Puerto Rico and of the Circuit Court of Appeals for the First Circuit are contrary to the implications of a number of cases of this Court dealing with importation and interstate and foreign commerce and the respective powers of the local and Federal governments over such matters at different moments in the course of the transactions. We

submit that the implications of *Fabbri* v. *Murphy,* 95 U. S. 191; *Low* v. *Austin,* 13 Wall. 29; *Thames etc. Insurance Co.* v. *United States,* 237 U. S. 19; *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95; *Helson* v. *Kentucky,* 279 U. S. 245 and *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506 are contrary to the holding of the court below.

The case presented here is similar to the case of *McGoldrick* v. *Gulf Oil Corporation,* No. 473 October Term 1939, now pending decision before this Court. On the principles of law involved, the *McGoldrick-Gulf Oil* case we submit cannot be distinguished from the present case.

The definition of "export" applicable to the merchandise here under consideration as given in Section 630 of the Revenue Act of 1932 as amended (26 U. S. C. A., p. 435) and the intent of these acts and of Section 309 of the Tariff Act of 1930 as clearly shown in the Debates and Committee Reports in Congress was to encourage the fueling and supplying of ships in American ports (Senate Report No. 58, 73rd Congress, First Session, May 1st, 1933; Congressional Record, May 11, 1933, p. 3262). The courts below ignored the definitions and intent of these Federal acts which applied to the merchandise here under consideration.

We believe the questions here presented have never been clearly settled by this Court and that they should be settled.

WHEREFORE your petitioner respectfully prays that writ of certiorari be issued under seal of this Honorable Court directed to the United States Circuit Court of Appeals for the First Circuit commanding that court to certify and send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all the proceedings in case numbered and entitled on its docket "No. 3501, October Term 1938, West India Oil Co. (P. R.), Plaintiff-Appellant *v.* Rafael Sancho

Bonet, Treasurer of Puerto Rico, Defendant-Appellee", and that the said decree of the United States Circuit Court of Appeals for the First Circuit may be revised by this Honorable Court and that your petitioner may have such other and further relief as to this Honorable Court may seem just, and your petitioner will ever pray.

JAMES R. BEVERLEY,
Attorney for Petitioner.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

San Juan, Puerto Rico, February 26, 1940.

JAMES R. BEVERLEY,
Attorney.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion of the insular District Court upholding petitioner's petition is not officially reported. It is printed in the transcript of record at page 15. The opinion of the insular Supreme Court is officially reported in Spanish in 56 D. P. R., p. 732 (Advanced Sheets). It is not yet reported in English but is found in the transcript of record at page 33. The opinion of the Circuit Court of Appeals for the First Circuit is reported in 108 F. (2d) (Advanced Sheets) at page 144.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States as amended by the act of September 13, 1925, 43 Stat. 938. The judgment of the Circuit Court of Appeals for the First Circuit was entered December 15, 1939 (R. 60).

Questions Presented.

The questions presented are stated in the petition filed herein.

Statutes Involved.

The statutes involved in the determination of this case are Section 62 of Act No. 85 of the Legislature of Puerto Rico approved August 20, 1925, as amended by Act No. 17, approved June 3, 1927; Section 555 of the Tariff Act of 1930 (46 Stat. 743), under which the oil tanks were bonded. Also involved are the title and Section 309 of the Tariff Act of 1930 and Sections 601 and 630 of the United States Revenue Act of 1932. All of these statutes are set out in Appendix I.

ARGUMENT.

Point I.

A Puerto Rican sales tax on the "price or value of the daily sales" of all articles sold in Puerto Rico cannot be made effective on the sale of foreign merchandise before it has been entered through the United States Customs and while the merchandise is still under the custody of the United States Customs officers under Section 555 of the Tariff Act of 1930, which custody continues through the delivery to ships' bunkers in the harbors of Puerto Rico.

A. The importation of foreign merchandise is not completed so long as the goods remain in the custody or control of the proper officers of the United States.

This we submit has always been both the executive and the judicial determination. Considering an earlier tariff act, this Court said in *Fabbri* v. *Murphy*, 95 U. S. 191, that Congress did not regard the importation as complete while the goods remained in the custody of the Customs. The Executive branch of the United States Government has always taken the same view. Treasury Dec. 21,158 (1899); 14 Op. A. G. U. S. 574; 21 Id. 233; 27 Id. 440. The same reasoning will hold for the Tariff Act of 1930.

In 17 *Corpus Juris* 552, in discussing customs duties, it is said:

> "With regard to goods in public stores and bonded warehouses it may be said that Congress does not regard their importation as complete while they so remain in the custody of the Customs officials * * *"

In the same volume of *Corpus Juris*, at page 661, it is said in regard to bonded warehouses, such as the ones involved in this suit:

> "The effect of warehousing goods under these provisions is to place them in the possession of the sovereign.

> We know of no cases which have changed this concept of law."

B. An insular sales tax cannot be laid on the sale of foreign articles still in the process of importation and before the articles themselves have become a part of the mass of property in the local taxing jurisdiction.

Such a tax is equivalent to an import duty. It is not necessary to consider the original package doctrine first enunciated in *Brown* v. *Maryland*, 12 Wheat. 419. It is sufficient to point out that here the foreign merchandise had never been entered through the Customs and was still under Customs custody.

Article 942 of the Customs Regulations of 1931 provides that

> "Merchandise in bonded warehouse is not subject to levy, attachment or other process of a state court * * *"

and

> "Imported goods in bonded warehouses are exempt from taxation under the general laws of the several states."

These regulations are continued in the Customs Regulations of 1937 (Act 940). Puerto Rico, as regards the tariff laws and regulations is in the same position as a State (31 Stat. 77; 48 U. S. C. A. 739).

The Secretary of the Treasury on May 18, 1899, ruled on a similar situation as follows (T. D. 21158):

> "The Department is in receipt of your letter of the 8th instant, transmitting an application, addressed to you by the chairman of the finance committee of the board of supervisors of San Francisco, for permission to inspect entries of goods in bond at your port, in order that the goods may be assessed for municipal taxes.
>
> "In reply, I have to state that inasmuch as, under Section 2971 of the Revised Statutes, importers have

a right to withdraw bonded goods for exportation within three years from date of bonding, pending which such goods *have no status as imports for the purposes mentioned,* your action in refusing access to your records for said purpose is proper under article 1166 of the regulations, and meets the approval of the Department." (Italics supplied.)

The case of *Sonneborn Bros* v. *Cureton,* 262 U. S. 506, draws a distinction between imports from foreign countries and interstate commerce as regards immunity from State taxation. It is said in that case that in imports, the immunity attaches to the import itself before sale following the case of *Brown* v. *Maryland, supra,* and the cases based upon that case including *Low* v. *Austin,* 13 Wall. 29 and *May* v. *New Orleans,* 178 U. S. 496. The same rule which prevented a license or occupation tax in *Brown* v. *Maryland,* a property tax in *Low* v. *Austin* and an occupation tax in *Cooke* v. *Pennsylvania,* 97 U. S. 566, would seem to protect imports in Puerto Rico against a local sales tax on their sale before they had passed through the Customs and been released by the officers of the United States. It is difficult to see any distinction in principle between the present case and the ones just cited. Foreign merchandise is treated in all of them, with the added fact that in the present case not only is the foreign fuel oil not entered through the Customs, but it is actually shipped out of the geographical confines of Puerto Rico while under the supervision of the United States Customs.

The statement in the opinion of the Circuit Court of Appeals that the transaction in the present case receives the protection of the insular laws is difficult to follow. Certainly while the foreign fuel oil involved was in the bonded tanks, it was under the exclusive protection of the Federal Government and laws and not under the protection of the insular laws. The contract for sale was made in New York

and hence did not come under the protection of the insular laws. The physical delivery of the oil to the ships out of the bonded tanks in Puerto Rico was certainly made under the exclusive protection of the Federal laws. There is no point at which the Insular Government furnishes any protection either to the transaction which it pretends to tax nor to the merchandise itself. There is thus nothing for which taxation can be "equivalent" as pointed out by "Cooley on Taxation", 4th Edition, Vol. 1, p. 219. The basic reasoning in a case of this kind is shown by Cooley in the same volume at page 222, where he states:

> "The accidental circumstance that it (the state) may have the means of reaching (the person concerned) can make no difference; there must be an interest in the subject matter of the tax; there must be between the state and the taxpayer a reciprocity of duty and obligation * * * "

Point II.

Foreign fuel oil delivered to ships' bunkers under the circumstances in this case for use on the high seas has been defined as "exported" by congressional statute, i. e., the Revenue Act of 1932 (26 U. S. C. A., pp. 427-435). This definition by Congress is controlling on the insular authorities of Puerto Rico so long as the fuel oil involved remains under Customs custody and control.

A. The fuel oil in question is an export so far as the Tariff Act of 1930 and the Revenue Act of 1932 are concerned.

The Tariff Act of 1930 is entitled "An Act to provide revenue, *to regulate commerce with foreign countries,* to encourage the industries of the United States, to protect American labor and for other purposes" (19 U. S. C. A. 1001). (Italics supplied.)

Section 309 of the Tariff Act of 1930 (19 U. S. C. A. 1309) in dealing with the exemption of supplies from duties and taxes says:

> "(a) Articles of foreign or domestic manufacture or production may, under such regulations as the Secretary of the Treasury may prescribe, be withdrawn from bonded *warehouses* or bonded manufacturing warehouses free of duty or internal revenue tax for supplies (not including equipment) of vessels of war in ports of the United States of any nation which may reciprocate such privilege toward the vessels of war of the United States in its ports, or for supplies (not including equipment) of vessels of the United States employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions, but no such article shall be landed at any port or place in the United States or in any of its possessions.
>
> "Drawback. (b) Articles of domestic manufacture or production laden as supplies upon any such vessel shall be considered to be exported within the meaning of the drawback provisions of this chapter." (46 Stat. 690.) (Italics supplied.)

The Revenue Act of 1932 (48 Stat. 256 found in 26 U. S. C. A. at page 427 ff. in providing a tax on crude petroleum in Section 601(c)4 provides that the tax on the articles in that paragraph *shall apply only with respect to the importation of such articles.* It is also provided in Section 601(b) that with certain exceptions the taxes shall be levied, assessed, collected and paid "*in the same manner as a duty imposed by the Tariff Act of 1930 and shall be treated for the purposes of all provisions of law relating to customs revenue as a duty imposed by such Act.* * * *"

Section 630 of the Revenue Act of 1932 as amended June 16, 1933 (26 U. S. C. A., p. 435) provides as follows:

"Section 630. Exemption from tax of certain supplies for vessels. Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax shall be imposed upon any article sold for use as *fuel supplies,* ship's stores, sea stores or legitimate equipment on * * * vessels * * * actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which a tax has been paid under this title, if laden for use as supplies on such vessels, *shall be held to be exported* for the purposes of Section 601(b)." (Emphasis supplied.)

This section (with the amendments made May 28, 1938, not germane here) is Section 3451 of the United States Internal Revenue Code approved February 10, 1939.

In reporting on the 1933 amendment to the Revenue Act of 1932 the Senate Committee (Senate Report No. 58, 73rd Congress, first session May 1st, 1933) expressed the purpose that Congress had in mind in exempting supplies for vessels.

"Your committee has inserted a new Section 5 providing for exemption from the manufacturers' excise taxes under the Revenue Act of 1932 of articles sold for use as supplies or equipment on vessels of war, vessels employed in the fisheries or whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. It is believed that this amendment will enable American manufacturers to compete more favorably with their foreign competitors for this business without any substantial loss of revenue since *the effect of the present law is to force purchase abroad.* The bill also provides for allowance of drawback on articles manufactured or produced with the use of merchandise on the importation of which tax has been paid under the Revenue Act of 1932, when such articles are laden for use as supplies

on vessels of the classes enumerated. *This also relieves American manufacturers from a competitive disadvantage.*" (Italics supplied.)

The debates on the same section show what was in the minds of the members of Congress (Congressional Record, May 11, 1933, p. 3262).

"Mr. Harrison: There is also a provision that deals with fuel oils and ship's stores and sea stores. It was found that many of the vessels which carry on the foreign trade heretofore had bought their fuel oil in this country, but since the passage of the tax act they have changed their practice and are filling their tanks abroad in the ports of foreign countries, and we are losing that trade. A provision is recommended by the committee that in the case of fuel oil, ship's stores, and so forth, as involved *in this class of foreign trade,* the tax shall not be imposed.

"Mr. Reed: Mr. President, the idea is this: At the present time, *ships* under the American flag or foreign flags, *engaged in the various services mentioned here, all have opportunity to buy their fuel oil at foreign ports, and since we have put a tax on that oil they have all been doing it.*" (Italics supplied.)

It is plain from the Tariff Act of 1930 and the Revenue Act of 1932, that Congress had in mind not only the raising of revenue, but the regulation of interstate and foreign commerce. Congress asserted this in the title to the Tariff Act of 1930, and in the Revenue Act of 1932 references are made to the effect of foreign treaties. Section 601(a). There is no question as to the all inclusive power of Congress over foreign and interstate commerce and it has been expressly held that the power to regulate commerce with foreign nations may be exercised in a taxing act such as the Tariff Act. *Board of Trustees of University of Illinois* v. *United States,* 289 U. S. 48. The drawback provisions have been stated to be for the purpose of building up export trade, encouraging manufactures in this country, etc. See *Tide*

Water Oil Co. v. *United States,* 171 U. S. 210, 216, 43 L. Ed. 139, where it is said:

> "The object of the section was evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries."

Congress in the exercise of its power over foreign commerce in the Tariff Act of 1930 and the Revenue Act of 1932 evidently had the same purpose in view when it exempted ships' supplies from tax *and defined them as exports.*

B. The definition of "export" as applied to the fuel oil in the present case by the above Federal laws, is binding on the authorities of Puerto Rico.

The fuel oil here concerned never lost its character as an import up to the time it was pumped into ships' bunkers, and thus "exported" within the meaning of the Federal laws governing it. It was exclusively under the control of the Federal laws at all times. Until it should lose its character as an import and should become mixed with the general mass of property within the territory of Puerto Rico, the provisions of the Revenue Act of 1932 and the related Tariff Act of 1930 and the definitions therein would necessarily control as to insular authorities. The Congress of the United States under its constitutional powers over commerce was within its rights in defining foreign fuel oil laden on ships under the conditions in this case as an "export". Puerto Rico being under the absolute jurisdiction of Congress would be bound by such definition until the oil was released from Customs custody. Otherwise, the Insular Government could interfere with and annul the expressed intention of Congress.

The purpose of defining such fuel oil as "exports" is shown in the Committee Report of the Senate and in the remarks of Senators Harrison and Reed, *supra*, pages 15-16.

It was the plain intention of Congress that ships' supplies including fuel oil should not be taxed, in order that American suppliers might compete with foreign suppliers. Congress determined that the word "export" in reference to ships' supplies should be given its ordinary or primary definition rather than its technical definition (*United States* v. *Chavez*, 228 U. S. 525) and the Insular Government of Puerto Rico would have no power through the application of a taxing statute to overthrow the intent of Congress in regard to the treatment of ships' supplies. The insular laws could not apply to the fuel oil here involved at any point of time since it was never within the jurisdiction of Puerto Rico.

C. A tax on the sale would be no different in fact and in effect from a tax on the merchandise itself.

The *McGoldrick* cases decided by this Court January 29th, 1940, do not decide the present case. In the *McGoldrick* cases, the goods were domestic to the United States and admittedly delivered within the jurisdiction of the City of New York. In the present case the merchandise is foreign and had never completed its importation before it was pumped into the ships' bunkers. The present case is more similar to that of *McGoldrick* v. *Gulf Oil Corporation*, No. 473, now pending before this Court.

The fuel oil concerned in the *Gulf Oil Corporation* case was also foreign oil landed in bond and subsequently transferred to ships' bunkers for use on the high seas. The oil in the *Gulf* case was processed in bond, while the oil in the present case underwent no processing. The processing or non-processing would not affect the legal situation. If the Gulf Oil Corporation prevails in its case, the petitioner must prevail in the present case.

Merchandise in the course of importation and while in Customs custody would be exempt from a local property tax. It would seem difficult to justify an excise on some transaction moving such foreign merchandise, since this would be to allow by indirection what could not be done directly. *Thames, etc.* v. *United States,* 237 U. S. 19; *Helson* v. *Kentucky,* 279 U. S. 245; *Philadelphia, etc., Steamship Co.* v. *Pennsylvania,* 122 U. S. 326; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Clyde Mallory Line* v. *Alabama,* 296 U. S. 261.

Any local tax which in fact taxes foreign commerce, or as in this case the oil used in propelling ships in interstate and foreign commerce, is invalid if its necessary effect is to lay a burden on such commerce. Cooley on Taxation, 4th Ed., Vol. 1, p. 809. The practical effect of the tax involved in the present case is to place an excise on the use of the fuel oil in propelling ships on the high seas in foreign commerce and in commerce between Puerto Rico and the continent.

Point III.

The fuel oil involved in this case never left the channels of foreign commerce in contemplation of law and no transaction connected therewith is taxable.

A. The idea that the sale of the fuel oil here involved is taxable because physical delivery (consummation of the sale) was made within the *geographical limits* of Puerto Rico, is invalid. The petitioner received no protection from the insular laws in anything connected with the sale or delivery of the oil. The contracts of sale were entered into in New York and the invoices made there and payment made there. These contracts were protected by the laws of New York; and the fuel oil under Customs custody and the delivery thereof, under the supervision of the Customs officers, to the ships, was protected exclusively by the laws of the United States. As between Puerto Rico and peti-

tioner, there was at no time any reciprocity of duty or obligation in connection with this oil or the sale thereof, which previously has always been thought necessary as a basis for a tax.

The Supreme Court of Puerto Rico apparently assumed that at the very instant when the oil was flowing through the pipelines to ships, it came within the jurisdiction of Puerto Rico. But as pointed out before, at this time the oil was still under Customs supervision since it was foreign oil, the importation of which had never been completed.

B. Any taxes imposed on imports while they are in Customs custody are import duties. *Stone & Downer Co.* v. *United States,* 19 C. C. P. A. (Customs 259); *Marshall Field & Co.* v. *United States,* Treasury Decisions 47,877; *Anglo-Chilean Corporation* v. *Alabama,* 288 U. S. 218, 226; *Fabbri* v. *Murphy, supra.*

This principle would apply as well to an excise tax on transactions connected with such goods as to a property tax on the goods themselves.

C. The course of the oil involved in this suit is from Aruba, Dutch West Indies, direct to a Federally bonded warehouse (tank), thence under the supervision of the United States Customs officers to the bunkers of ships for consumption on the high seas in journeys from Puerto Rico to foreign countries and to ports of the continental United States. The facts compel the conclusion that the oil was at all times still in the channels of foreign commerce. *Carson Petroleum Co.* v. *Vial, supra; Railway Co.* v. *Sabine Tram Co.,* 227 U. S. 111; U. S. Customs Regulations of 1931, Section 942, *supra; Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 at p. 292. *Bingaman* v. *Golden Eagle Lines,* 297 U. S. 626.

The present tax cannot be justified as a use tax, *Helson* v. *Kentucky, supra,* and in any event the use takes place out-

side Puerto Rico. The contract of sale cannot be taxed, as it took place in New York. The only thing left is a delivery. But this delivery of the oil takes place under the control of the United States Customs officers. No taxable act takes place within the jurisdiction of the Insular Government.

In *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583 the tax was upon use. Mr. Justice Cardozo observed:

> "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself."

Here the converse is true. The tax is upon sale (or delivery) but upon a sale so closely connected with the use in foreign and other commerce as to be open to the same objections as if the tax had been laid directly upon the use of the oil by the vessels at sea.

D. The interstate or foreign character of the merchandise is not affected by the right of diversion to a local destination. *Dahnke-Walker Milling Co.* v. *Bondurant, supra.* Neither does the fact that smaller quantities may be taken out for local delivery affect the character of the remaining merchandise. *Eureka Pipeline* v. *Hallanan,* 257 U. S. 265; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277; *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 493, where it is pointed out:

> "But in making such internal regulations a State cannot impose taxes * * * upon property imported into the State from abroad * * * and not yet become part of the common mass of property therein. * * *"

Also in *Railway Co.* v. *Sims,* 191 U. S. 441, 449:

> "* * * we have uniformly held that states have no power to tax * * * goods imported from foreign countries * * * before they have become commingled with the general property of the state and lost their distinctive character as imports."

The fuel oil concerned in this case certainly never became a part of the general mass of property within Puerto Rico and a tax on it or on a transaction connected with it is void upon the precedents cited.

Conclusion.

It is respectfully submitted that the foreign fuel oil involved in this case was never at any time within the jurisdiction of Puerto Rico and had never at any time finished its importation and become incorporated into the general mass of property in the Island and as such a delivery of such fuel oil within the geographical limits of Puerto Rico would not be subject to a sales tax under Section 62 of the insular Internal Revenue Act. It is further submitted that the deliveries took place outside the jurisdiction of Puerto Rico, and under the control and custody of the United States Customs officers and no insular tax could be levied on such deliveries.

It is further submitted that the oil in this case was exported within the meaning of the United States laws controlling the oil at all times, and a Puerto Rican tax on such export is invalid. If the tax attempted to be levied in this case should be made effective, it would constitute in substance a burden upon foreign commerce and a tax upon merchandise still in the course of foreign commerce, and would permit the Government of Puerto Rico to hinder and frustrate the declared purposes of Congress as expressed in the Tariff Act of 1930 and the Revenue Act of 1932.

The judgment of the United States Circuit Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

James R. Beverley,
Attorney for Petitioner,
West India Oil Company (Puerto Rico).

APPENDIX I.

CONSTITUTION:

Article IV, Section 3, Clause 2:

The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

FEDERAL:

The Organic Act for Puerto Rico, Act of March 2, 1917, c. 145, 39 Stat. 951:

(Sec. 1) That the provisions of this Act shall apply to the Island of Porto Rico and to the adjacent islands belonging to the United States, and waters of those islands; * * *

Sec. 3. (As amended by Act of Congress, approved March 4, 1927.) That no export duties shall be levied or collected on exports from Porto Rico, but taxes and assessments on property, income taxes, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Porto Rico; * * *

Tariff Act of 1930, Act of June 17, 1930, c. 497, 46 Stat. 690, 743, Secs. 309, 555, 556, Titles III and IV; 19 U. S. Code, Pars. 1309, 1555 and 1556:

Sec. 309. Supplies for certain vessels—Exemption from customs duties and internal-revenue tax.

(a) *Articles of foreign* or domestic manufacture or production may, under such regulations as the Secretary of the Treasury may prescribe, *be withdrawn from bonded warehouses* or bonded manufacturing warehouses *free of duty or internal-revenue tax* for supplies (not including equipment) of vessels of war, in ports of the United States, of any nation which may reciprocate such privilege toward the vessels of war of the United States in its ports, or *for supplies* (not including equipment) *of vessels of the United States employed* in the fisheries or in the whaling business,

or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or *between the United States and any of its possessions,* but no such article shall be landed at any port or place in the United States or in any of its possessions. (Italics supplied.)

Drawback.

(b) Articles of domestic manufacture or production laden as supplies upon any such vessel shall be considered to be exported within the meaning of the drawback provisions of this chapter. (June 17, 1930, c. 497, Title III, Sec. 309, 46 Stat. 690.)

Sec. 555. Bonded Warehouses.

Buildings, or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this Act, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the

officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the Proprietor of such warehouse.

Sec. 556. Same—Regulations for Establishing.—The Secretary of the Treasury shall from time to time establish such rules and regulations as may be necessary for the establishment of bonded warehouses and to protect the interests of the Government in the conduct, management, and operation of such warehouses and in the withdrawal of and accounting of merchandise deposited therein.

Revenue Act of 1932; June 6, 1932; c. 209 Sections 601 (a); 601 (c) 4; 601 (b) 5; 630 (as amended June 16, 1933, c. 96, Sec. 5, 48 Stat. 255); U. S. Internal Revenue Code Sections 3420, 3422, 3430, 3451; 47 Stat. 259, 260:

Part I. Special Provisions.

Sec. 3420. Imposition of tax.—In addition to any other tax or duty imposed by law, there shall be imposed upon the following articles imported into the United States unless treaty provisions of the United States otherwise provide a tax at the rates specified in sections 3422 to 3425, inclusive.

Sec. 3422. Petroleum and derivatives.—Crude petroleum, ½ cent per gallon; fuel oil derived from petroleum, gas oil derived from petroleum, and all liquid derivatives of crude petroleum, except lubricating oil and gasoline or other motor fuel, ½ cent per gallon; gasoline or other motor fuel, 2½ cents per gallon; lubricating oil, 4 cents per gallon; paraffin and other petroleum wax products, 1 cent per pound. The tax on the articles described in this section shall apply only with respect to the importation of such articles.

Sec. 3430. Applicability of tariff provisions.—The tax imposed by section 3420 shall be levied, assessed, collected, and paid in the same manner as a duty imposed by the Tariff Act of 1930, 46 Stat. 590, 672 (U. S. C. Title 19, c. 4)

and shall be treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by such Act, except that * * * and for the purposes of taxes under section 3422 to 3425, inclusive, the term "United States" includes Puerto Rico.

Sec. 3451. Exemption from tax of certain supplies for vessels.—Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under this chapter shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this chapter, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of section 3430.

Puerto Rico: Internal Revenue Law of Puerto Rico, as amended by Act No. 17 of June 3, 1927; Laws of 1927, Special Session, pp. 458-486.

Sec. 62.—There shall be levied and collected, once only, on the sale of any article the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, and at the time of sale in Porto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale (pp. 472-474).

IN THE

Supreme Court of the United States

October Term, 1940

No. 26

WEST INDIA OIL COMPANY (PUERTO RICO),
Petitioner,

vs.

MANUEL V. DOMENECH, Treasurer of Puerto Rico (Substituted for Rafael Sancho Bonet, former Treasurer),*
Respondent.

BRIEF FOR PETITIONER.

JAMES R. BEVERLEY,
Attorney for Petitioner.

* Motion for Substitution made September 10, 1940.

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Respondent.

BRIEF FOR PETITIONER.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This case involves the validity of the application of the Puerto Rican 2% *ad valorem* sales tax to foreign fuel oil stored temporarily in federally bonded tanks in Puerto Rico and delivered directly out of such bonded tanks to ships' bunkers under the supervision of the United States Customs Service, for use at sea in the propulsion of ships in foreign journeys and in journeys between the Island of Puerto Rico and the continental United States, the contracts

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for such sales to ships having been entered into in New York City.

The District Court of San Juan held that such tax could not be applied to foreign fuel oil pumped from federally bonded tanks into ships' bunkers; that such oil having never been entered through the United States Customs, never became a part of the mass of property within the taxing jurisdiction of Puerto Rico, and that the "sales" taxable under the Puerto Rico Sales Tax Act are only those sales carried out in the Puerto Rican market.

The Supreme Court of Puerto Rico reversed the District Court, holding that the delivery of the oil in Puerto Rico to ships constituted a sale in Puerto Rico taxable by the Insular Government, and inferentially (R. 46, 48) that at the moment of pumping of the oil to ships' bunkers, the foreign oil lost its character as an import and "came into" Puerto Rico and became subject to the taxing jurisdiction of the Island.

The United States Circuit Court of Appeals for the First Circuit at Boston affirmed the Supreme Court of Puerto Rico (R. 65 ff.).

This Court granted certiorari (R. 61).

Questions Presented.

The questions presented for consideration are all related to the status of foreign fuel oil not entered through the United States Customs but stored in Puerto Rico in federally bonded tanks and subsequently, under the supervision of United States Customs officers, pumped from the bonded tanks to ships' bunkers for use and consumption on the high seas. Although the questions are interrelated, it seems advisable to present them under three headings.

1. Whether the sale in New York and delivery within the geographical limits of Puerto Rico to ships' bunkers of foreign fuel oil brought by petitioner to Puerto Rico and stored in Federally bonded tanks under the joint custody of petitioner and the United States Customs officers to await delivery to ships' bunkers, is subject to the tax on sales imposed by Section 62 of Act No. 85 of the Legislature of Puerto Rico approved August 20th, 1925 as amended by Act No. 17 approved June 3rd, 1927.

The Circuit Court of Appeals erroneously assumed in its opinion that the tax involved was "an excise tax based on the privilege of conducting such business". This is incorrect. Business license taxes are provided for in another section of the same taxing act (Section 84 of Act No. 85) which is not in controversy here. The tax here concerned is a straight tax on sales.

2. Whether foreign fuel oil stored in federally bonded tanks in Puerto Rico and later transferred to ships' bunkers for consumption on the high seas is "exported" within the meaning of the Tariff Act of 1930 (19 U. S. C. A. 1309) and the Revenue Act of 1932 (48 Stat. 256; 26 U. S. C. A., pp. 427-435), and if so, whether such definitions would control in all transactions covering the foreign fuel oil here involved, considering that such fuel oil has never been entered through the United States Customs and remains, while in Puerto Rico, under Customs custody.

3. Whether a Puerto Rico tax on the sale of foreign fuel oil which has never been entered through the Customs, and delivery of which is made in Puerto Rico out of federally bonded tanks to ships' bunkers for consumption on the high seas, would constitute a prohibited burden on foreign commerce and on commerce between Puerto Rico and the continental United States.

Statutes Involved.

The statutes to be considered in connection with this case are certain parts of the Act of Congress of March 2nd, 1917, known as The Organic Act of Puerto Rico (39 Stat. 951) quoted hereafter; Section 62 of Act No. 85 of the Legislature of Puerto Rico approved August 20th, 1925, as amended by Act No. 17 approved June 3rd, 1927; Section 555 of the Tariff Act of 1930 (46 Stat. 743), under which the oil tanks here involved were bonded. Also involved are the title and Section 309 of the Tariff Act of 1930 and Sections 601 and 630 of the United States Revenue Act of 1932.

The first paragraph of Section 2 of the Organic Act of Puerto Rico (48 U. S. C. A. 737) reads as follows:

> "No law shall be enacted in Puerto Rico which shall deprive any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws."

Section 3 of the Organic Act of Puerto Rico (48 U. S. C. A. 741) provides in part as follows:

> "No export duty shall be levied or collected on exports from Puerto Rico . . ."

Section 2 of the Act of Congress of April 12th, 1900 (31 Stat. 77; 48 U. S. C. A. 739) which is still in effect, provides in part as follows:

> "The same tariff, customs, and duty shall be levied, collected, and paid upon all articles imported into Puerto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries."

Section 62 of the Internal Revenue Law of Puerto Rico, Act No. 85 approved August 20th, 1925, as amended by Act

No. 17 approved June 3rd, 1927 (Laws of 1927, Special Session, pp. 458-486) provides as follows:

> "Section 62.—There shall be levied and collected once only on the sale of any article the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, and at the time of sale in Puerto Rico, a tax of two (2) per cent on the price or value of the daily sales of such article, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale."

The title of the United States Tariff Act of 1930 reads:

> "An Act to Provide Revenue, *to Regulate Commerce with Foreign Countries, to Encourage the Industries of the United States,* to Protect American Labor and for Other Purposes" (19 U. S. C. A. 1001; italics supplied).

The pertinent sections of the U. S. Tariff Act of 1930 and the United States Revenue Act of 1932 are as follows:

Tariff Act of 1930.

Tariff Act of 1930, Act of June 17, 1930, c. 497, 46 Stat. 690, 743, Secs. 309, 555, 556, Titles III and IV; 19 U. S. Code, Pars. 1309, 1555 and 1556:

> "Sec. 309. Supplies for certain vessels—Exemption from customs duties and internal-revenue tax.
>
> "(a) Article of *foreign* or domestic manufacture or production may, under such regulations as the Secretary of the Treasury may prescribe, be *withdrawn from bonded warehouses* or bonded manufacturing warehouses *free of duty or internal-revenue tax* for supplies (not including equipment) of vessels of war, in ports of the United States, of any nation

which may reciprocate such privilege toward the vessels of war of the United States in its ports, or *for supplies* (not including equipment) of vessels of the United States employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or *between the United States and any of its possessions*, but no such article shall be landed at any port or place in the United States or in any of its possessions. (Italics supplied.)

Drawback.

"(b) Articles of domestic manufacture or production laden as supplies upon any such vessel shall be considered to be exported within the meaning of the drawback provisions of this chapter. (June 17, 1930, c. 497, Title III, Sec. 309, 46 Stat. 690.)

"Sec. 555. Bonded Warehouses.

"Buildings, or parts of buildings and other enclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of mer-

chandise in such warehouse. Except as otherwise provided in this Act, bonded warehouses shall be used solely for the storage of imported merchandise and *shall be placed in charge of a proper officer of the customs,* who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse. (Italics supplied.)

"Sec. 556. Same—Regulations for Establishing. —The Secretary of the Treasury shall from time to time establish such rules and regulations as may be necessary for the establishment of bonded warehouses and to protect the interests of the Government in the conduct, management, and operation of such warehouses and in the withdrawal of and accounting of merchandise deposited therein."

Revenue Act of 1932.

Revenue Act of 1932; June 6, 1932; c. 209 Sections 601(a); 601(c) 4; 601(b) 5; 630 (as amended June 16, 1933, c. 96, Sec. 5, 48 Stat. 255); U. S. Internal Revenue Code, Sections 3420, 3422, 3430, 3451; 47 Stat. 259, 260:

Part I. Special Provisions

"Sec. 3420. Imposition of tax.—In addition to any other tax or duty imposed by law, there shall be imposed upon the following articles imported into the United States unless treaty provisions of the United

States otherwise provide a tax at the rates specified in sections 3422 to 3425, inclusive. 53 Stat. 414.

"Sec. 3422. Petroleum and derivatives.—Crude petroleum, ½ cent per gallon; fuel oil derived from petroleum, gas oil derived from petroleum, and all liquid derivatives of crude petroleum, except lubricating oil and gasoline or other motor fuel, ½ cent per gallon; . . . The tax on the articles described in this section shall apply only with respect to the importation of such articles. 53 Stat. 414.

"Sec. 3430. Applicability of tariff provisions.—The tax imposed by section 3420 shall be levied, assessed, collected, and paid in the same manner as a duty imposed by the Tariff Act of 1930, 46 Stat. 590, 672 (U. S. C. Title 19, c. 4) and shall be treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by such Act, except that . . . and for the purposes of taxes under sections 3422 to 3425, inclusive, the term 'United States' includes Puerto Rico. 53 Stat. 415.

"Sec. 3451. Exemption from tax of certain supplies for vessels.—Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under this chapter shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States *or between the United States and any of its possessions.* Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this chapter, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of section 3430. . . ." 53 Stat. 419. (Italics supplied.)

Opinions Below.

The opinion of the District Court of San Juan is not reported. It is found in the Record at pages 15-22. The opinion of the Supreme Court of Puerto Rico is officially reported in Spanish in 56 D. P. R. 732 (Advance Sheets). A translation into English of the same is found in the Record at pages 33-49. The opinion of the United States Circuit Court of Appeals for the First Circuit is reported in 108 Fed. (2d) 144.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13th, 1925, c. 229, 43 Stat. 938. The Judgment of the United States Circuit Court of Appeals for the First Circuit was entered December 15th, 1939. Certiorari was applied for March 2nd, 1940 and was granted by this Court April 22nd, 1940.

Statement of Facts.

West India Oil Co. (P. R.), petitioner here, is a corporation organized under the laws of Puerto Rico and engaged in Puerto Rico in the importation, sale in Puerto Rico, exportation to foreign ports and in the delivery to ships for their own use upon the high seas of petroleum products. So far as the present case is concerned, petitioner brings fuel oil from Aruba, Dutch West Indies, to Puerto Rico and stores it in bond under Section 555 of the Tariff Act of 1930 (46 Stat. 743, 19 U. S. Code 1555) copied above. The fuel oil is not entered through the Customs but is either re-exported or is delivered out of the bonded tanks to ships' bunkers for their use on the high seas in journeys either to

foreign ports or to ports of the continental United States (R. 24, Qs. 12, 16; also R. 25, Q18). In accordance with the Tariff Act of 1930 and in accordance with the regulations of the United States Customs Service, the oil so deposited in bonded tanks is under the joint control of the Customs Service of the United States and of the owner (R. 25, Qs. 18(f), 18(i); also R. 31, Q90). Since the fuel oil is not entered through the United States Customs, the Customs Service maintains a supervision over the oil and no oil can be drawn from the bonded tanks without the consent and presence of a Customs officer. In fact, the supervision of the United States Customs in this case goes beyond the mere supervising of withdrawal. The Customs Service requires that the petitioner furnish it a certificate from the Captain or the Engineer of the steamer using the oil, showing that it was used on the high seas. It may be said, therefore, that the supervision of the Customs officers over the fuel oil involved continues until the same is wholly consumed at sea (R. 31, Q90).

Sales are made both to lines which journey to foreign countries and thus consume the fuel oil in foreign commerce and to lines which go from Puerto Rico to United States ports and thus consume the fuel oil in what might be designated as coastwise traffic (R. 26, XQ32). The District Court took as admitted by the parties that the fuel oil delivered to the steamers for use on the high seas was both in the course of interstate commerce and of foreign commerce, thus taking judicial notice of the fact that both the New York & Porto Rico Steamship Co. and the Compañía Trasatlántica Española referred to in cross-question 32 on page 26 of the Record, make trips to foreign countries.

When a cargo of fuel oil is brought to Puerto Rico by the petitioner from Aruba, Dutch West Indies, that part of the cargo destined for use in the bunkers of ship is stored

in a bonded tank as is also the part destined for re-export to foreign countries (R. 26, Q24; also R. 27, XQ42). That part of the cargo destined for consumption in Puerto Rico is entered through the Customs and stored in other tanks not bonded.

The usual course of business in the delivery of fuel oil to ships' bunkers by petitioner involves the making of contracts of sale in New York by another oil company (presumably an affiliate) and orders or requests to petitioner to deliver certain amounts of oil to the steamers involved under the contracts (R. 24, Q15; R. 26, Q22; R. 29, XQ73).

Occasionally small amounts are drawn from the bonded tank for use in Puerto Rico and in such cases this oil is entered through the Customs Service in the regular way, the Customs duty is paid and also the Puerto Rico sales tax here involved is paid on such oil so withdrawn for use locally. Amounts withdrawn for sale or use in Puerto Rico are small, the principal object of the bonded tanks being to supply ships' bunkers for use at sea (R. 30, XQ86; R. 30, Q82).

On December 3rd, 1932, under Section 555 of the Tariff Act of 1930, petitioner's predecessor company bonded two of its tanks for such a storage of fuel oil entered in bond from foreign countries and destined either for re-export or for delivery to ships' bunkers for use on the high seas. In 1935 the respondent Treasurer of Puerto Rico attempted to collect a 2% tax on such oil delivered to ships' bunkers for use on the high seas from the bonded tanks, under Section 62 of Act No. 85 of the Legislature of Puerto Rico approved August 20th, 1925, as amended (quoted above, p. 4). When the fuel oil is brought from the Dutch West Indies, the proportion destined for export and for ships' bunkers is not entered through the Customs but is placed in the bonded tanks, and the part destined for sale or use in Puerto Rico

is entered in the regular way, the federal tax is paid and 2% Puerto Rican sales tax is paid.

The only controversy here involved is in respect to fuel oil pumped into ships' bunkers out of the bonded t for use of the ships on the high seas in journeys in for and domestic commerce.

Petitioner's Contention.

Petitioner takes the position that the fuel oil invo in this case, never having been entered through the U States Customs, acquired no *situs* for taxation in Pu Rico and that as a corollary proposition the Insular Gov ment is without authority to tax any transaction suc sale or delivery, moving such fuel oil in commerce. merchandise at no time passed through the tariff bar of the United States and at no time became a part of mass of property within the territory and thus subje the territorial jurisdiction for taxing purposes, whethe excise or property taxes. The situation would possibl different if the fuel oil had ever been entered through Customs and had become a part of the mass of prop within the jurisdiction of Puerto Rico. Then it might become subject to local property taxes or excises, but s as the present case is concerned, the oil was never w the jurisdiction of Puerto Rico, and the transaction w moved the oil on board the ship is not subject to taxation.

Petitioner also contends that at all times the fue involved was subject to the provisions of the Revenue of 1932 as amended and that this Federal statute ha provided through reference to the Tariff Act of 1930, such ship supplies shall be considered as "exports", local Insular Government of Puerto Rico is also boun treat these deliveries as exports so long as the sup

never left the control and custody of the Customs officers. A tax on exports is forbidden to the Insular Government of Puerto Rico by Section 3 of the Act of Congress of March 2, 1917 known as the Organic Act of Puerto Rico (39 Stat. 953, 48 U. S. C. A. 741).

To allow Puerto Rico to tax the delivery of this foreign oil to ships' bunkers is to permit the Insular Government to frustrate and defeat the declared purpose of Congress in the Revenue Act of 1932 and the Tariff Act of 1930 to exempt ships' fuel oil from tax.

Petitioner also takes the position that the application of the insular tax to the fuel oil here involved would constitute in fact a direct and prohibited burden on interstate and foreign commerce and a duty on tonnage.

Specifications of Errors to be Urged.

The specifications of errors to be urged are found above under the heading of "Questions Presented" and "Petitioner's Contention".

Summary of Argument.

Petitioner's argument is to the following effect. No importation of foreign merchandise is complete under either administrative or judicial decisions so long as the goods remain under the custody and control of the proper officials of the United States Customs Service and the importation is complete only when the proper duties have been paid and the merchandise released from Customs custody to the complete control of the importer. So long as the goods remain under the control of the Customs Service, the merchandise is *in process* of importation and cannot be subject to taxes

or other exactions of states or other taxing jurisdictions other than the United States Government. A territorial tax at this stage either on the property or on a transaction moving the property would be equivalent to an "import duty" which Puerto Rico cannot lay. Also to hold otherwise would be to permit the states and territories to interfere with and perhaps even prohibit (through taxes or other exactions) the importation of foreign goods, a power denied to them under the Constitution of the United States, Article I, Section 8, Clause 3. The foreign fuel oil involved in the present case came under the immediate and complete supervision of the United States Customs Service from the moment it entered the harbor of San Juan (or Ponce, as the case may be) and such supervision and control never ceased until the oil was consumed at sea by ships in their journeys. It was never "imported" into Puerto Rico, but was merely entered in bond until such time as it should be delivered to the ships' bunkers. The argument then follows that Puerto Rico never acquired taxing jurisdiction over this fuel oil; it never entered technically into the Island and never became a part of the mass of property in the Island, but remained apart under federal control.

A second argument is based on the provisions of the United States Tariff Act of 1930, as amended, which in dealing with certain supplies to ships, including fuel oil, states that such supplies shall be treated as "exported". The Revenue Act of 1932 in Section 601(b) provides that the taxes involved "shall be treated for the purposes of all provisions of law relating to customs revenue as a duty imposed by such Act . . ." (Tariff Act of 1930). So far as the fuel oil here involved is concerned, all the provisions of law relating to customs duties apply. Further in the Tariff Act of 1930, Congress incorporated by reference the regulations of the Secretary of the Treasury (Sec. 309). Article

942 of the Customs Regulations of 1931 provides in part that "Imported goods in bonded warehouses are exempt from taxation under the general laws of the several States." This identical regulation also appears in Customs Regulations of 1937 (Art. 940) and in prior regulations (1923). Congress in the title to the Tariff Act of 1930 has asserted that one of the purposes of the act is to "regulate commerce with foreign countries" and another purpose is "to encourage the industries of the United States."

It is not contended that the fuel oil here involved was "exported" in the technical sense, but it is contended that Congress has said that such fuel oil shall be treated as if exported, and that the territory of Puerto Rico is bound by this expressed intention of Congress and is bound also to treat this fuel oil as if it were an export. It follows that no tax on any transaction moving this oil in commerce could be taxed by Puerto Rico, being prohibited both by the will of Congress in the Revenue Act of 1932, and by the Customs Regulations.

A further argument will be made to the effect that under the circumstances of this case, the fuel oil involved never left the channels of interstate or foreign commerce, and that in such case a tax cannot be validly laid by Puerto Rico on the delivery of the oil to ships' bunkers. It would seem also that a tax on this oil or upon the delivery to ships' bunkers would be a direct burden on interstate and foreign commerce, since the oil is used exclusively in the propulsion of ships in interstate and foreign commerce. From a practical standpoint, if the present tax is valid, the Insular Government *could* impose such taxes as to make it impossible for ships to fuel in Puerto Rican ports and thus drive them to fuel in foreign or other ports. The debates in Congress on the Revenue Act of 1932 and its amendments

show that Congress had precisely this situation in mind when it exempted ships' supplies from taxes.

In the case of *McGoldrick* v. *Berwind-White Coal Mining Co.*, 84 Law Ed. 343 (Advance Sheets) the Court held that the New York City sales tax was applicable to a contract of sale made in New York for delivery in New York from Pennsylvania. But this Court has never held, we believe, that the State of *exit* could levy a tax on goods moving in interstate commerce or on the transaction moving them. In the *Berwind-White* case, no foreign goods were involved and the questions here involved were not touched upon, but we point out that in that case, both the contract and the delivery were in New York and at least part of the goods were to be used and consumed in New York. In the instant case, the fuel oil is *moved out* of Puerto Rico to the high seas by the transaction attempted to be taxed, and the contract for sale is not made in Puerto Rico, with the added important fact that the fuel oil was never technically in Puerto Rico, but was under the control of the United States Customs Service at all times. On principle, the instant case is analogous to the case of *McGoldrick* v. *Gulf Oil Corporation*, 84 Law. Ed. 597 (Advance Sheets). There the oil also was foreign, entered in bond and there the oil was subsequently pumped into ships' bunkers for use in propelling the ships in foreign commerce. The principal distinction between the *Gulf Oil* case and the instant case is that here some of the oil is used in propelling ships in foreign commerce and some in propelling ships in the coastwise trade between ports of Puerto Rico and ports of the continental United States. The principles involved would seem to be the same. for the burden on interstate commerce would be exactly as great as the burden on foreign commerce and both are matters of national concern, on which Congress has spoken and occupied the field.

ARGUMENT.

POINT I.

The importation of the fuel oil here concerned was never completed.

Coming from Aruba, Dutch West Indies, a foreign country, the fuel oil involved in this case came directly under the control of the United States Customs officers from the moment it entered the harbor in Puerto Rico and remains under such custody and control until it is pumped into ships' bunkers and wholly consumed at sea. From the time it enters the harbor it is segregated from the general mass of property within the territory of Puerto Rico and never becomes mingled with such common mass of property. It has long been held that the importation of foreign mechandise is not complete so long as the goods remain in the control or custody of the proper officers of the Customs Service.

In the case of *Fabbri* v. *Murphy*, 95 U. S. 191, 197, it is said, referring to an earlier act:

> "Throughout these provisions the plain inference is that Congress did not regard the importation as complete while the goods remained in the custody of the proper officers of the Customs."

The same situation exists today and the same reasoning will hold for the Tariff Act of 1930, which is applicable to the fuel oil in this case. The Executive Branch of the United States Government, we submit, has always taken the same view. Treasury Decisions 21,158 (1899); 14 Opinions A. G. U. S. 574; 21 Id. 233; 27 Id. 440. The reasoning throughout these opinions and rulings is as applicable today as it was when they were written. See also *Harris* v. *Dennie*,

28 U. S. 292; *In re Johnson*, 13 Fed. Cases No. 7424; *Marriott* v. *Brune*, 50 U. S. 619, 632; *Lawder* v. *Stone*, 187 U. S. 281, 284, 286.

Bonded warehouses are considered as agencies of the United States. 33 C. J. 340. In the case of *American Cigar Co.* v. *United States*, 146 Fed. 484 (reversed later on other grounds), it was held that the importation of merchandise is not completed while the goods remain in the custody of Customs officers and that the general rule is that revenue can be collected only upon the quantity of the taxable subject matter which is actually imported and received by the importer so as tc come into the *consumption of the country.* In *Marriott* v. *Brune, supra*, this Court said:

> "As to imports, they, therefore, can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom-house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufacture . . ."

In 17 C. J. 552, in discussing customs duties, it is said:

> "With regard to goods in public stores and bonded warehouses it may be said that Congress does not regard their importation as complete while they so remain in the custody of the Customs officials . . ."

In the same volume of Corpus Juris, at page 661, it is said in regard to bonded warehouses, such as the one here involved:

> "The effect of warehousing goods under these provisions is to place them in the possession of the sovereign."

We believe that these principles of law are still the proper concepts and we know of no cases which have

nged them. In the present case, while the fuel oil is in bonded tanks, while it is being pumped to ships' bunkers, l after it is so pumped, it is at all times segregated from domestic goods and on the books of the customhouse the only way that goods of this nature can be segregated, t is, by careful accounting of the location and disposition the merchandise. This is done by the United States Cus-ns officers and even while the vessel is sailing, the super-ion of the United States Customs authorities continues . 31).

It is clear that the importation of the fuel oil here con-ned was never terminated, no federal duties were paid . 26; U. S. Internal Revenue Code, Section 3451).

POINT II.

An insular sales tax on a transaction moving out of e country foreign goods in the process of importa-n is a tax on imports and forbidden to the Insular overnment.

The goods concerned having never lost their distinctive iracter as an import, any tax imposed by the Insular Gov-iment upon the goods or upon the delivery of the same outgoing vessels would be a tax of the nature of an port duty. Assuming for the sake of argument that the e of the goods here concerned was made in Puerto Rico ause the delivery to the ships was made here (as was d by the Supreme Court of Puerto Rico), nevertheless s sale was the *first sale* of an import which in fact had er lost its distinctive character as an import. Such a is forbidden under the doctrine of *Brown* v. *Maryland,* U. S. 419, and of the cases subsequently modifying and tinguishing that case. It is only when the merchandise

imported has become incorporated into the general mass of property of the country that it loses its distinctive character as an import and any tax, regardless of the name of the tax, laid upon the goods in process of importation, "intercepts the import, as an import, on its way to become incorporated with the general mass of property . . ."

This Court also said in *Brown* v. *Maryland:*

> ". . . All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself . . . It is sufficient for the present to say generally that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the state; but while remaining the property of the importer in his warehouse, in the original form of package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

The Original Package Doctrine is simply one convenient means of establishing a division line between imports and property incorporated into the general mass of property in the state. In so far as it is possible for bulk fuel oil to be in original packages at all, we think it may be said that the fuel oil involved in this case is subject to that doctrine since it was at all times readily identifiable as an import and easy to trace. *City of Galveston* v. *Mexican Petroleum Corporation,* 15 Fed. (2d) 208; *Southern Pac. Co.* v. *City of Calexico,* 288 Fed. 634.

In the present case not only had the oil involved retained its distinctive character as an import, but as pointed out in Point I of the Argument, it had never finished the course of importation, but had been segregated and was held under bond.

Article 942 of the Customs Regulations of 1931 provides part that "merchandise in bonded warehouse is not subct to levy, attachment or other process of a state court . . . mported goods in bonded warehouse are exempt from taxaon under the general laws of the several states." These rovisions are the same as appear in Customs Regulations, 937 (Article 940); 1923 (Article 850); and 1915 (Article 31). These regulations were in force at the time the Tariff ct of 1930 went into effect and were incorporated therein reference by the provisions of Section 309.

That taxes imposed on goods still in Customs custody or oon a transaction directly connected with the same are the quivalent of import duties, we think has always been the olding of this and other courts. *United States* v. *Pillsbury lour Mills Co.*, 96 Fed. (2d) 854 (certiorari denied 304 . S. 582); *Faber et als.* v. *United States*, 97 Fed. (2d) 115; *eorge E. Warren Corp.* v. *United States*, 97 Fed. (2d) 105 certiorari denied 305 U. S. 600); *Marshall Field & Co.* v. *nited States*, T. D. 47,877. See also *Low* v. *Austin*, 13 Vall. 29; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 93, 494; *Willcuts* v. *Bunn*, 282 U. S. 216, 228; *Anglo-Chilean orp.* v. *Alabama*, 288 U. S. 218, 226; *Cassaza & Brother* v. *nited States*, 13 Ct. Cust. App. 627; *Stone & Downer Co.* *United States*, 19 C. C. P. A. (Customs) 259; *Shaw & Co.* *United States*, 16 Ct. Cust. App. 214, 220.

Puerto Rico, as regards tariff laws and regulations, is in he same position as a state (31 Stat. 77, 48 U. S. C. A. 39).

On the lack of power of the states to impose taxes of any ind connected with goods in Customs custody, the Secreary of the Treasury, on May 18th, 1899 (T. D. 21,158) ruled s follows:

> "The Department is in receipt of your letter of the 8th instant, transmitting an application, ad-

> dressed to you by the chairman of the finance committee of the board of supervisors of San Francisco, for permission to inspect entries of goods in bond at your port, in order that the goods may be assessed for municipal taxes.
>
> "In reply, I have to state that inasmuch as, under Section 2971 of the Revised Statutes, importers have a right to withdraw bonded goods for exportation within three years from date of bonding, pending which such goods *have no status as imports for the purposes mentioned*, your action in refusing access to your records for said purpose is proper under article 1166 of the regulations, and meets the approval of the Department." (Italics supplied.)

The case of *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, draws a distinction between imports from foreign countries and interstate commerce as regards immunity from State taxation. It is said in that case that *in imports*, the immunity attaches to the import itself before sale following the case of *Brown* v. *Maryland, supra*, and the cases based upon that case including *Low* v. *Austin*, 13 Wall. 29, and *May* v. *New Orleans*, 178 U. S. 496. The same rule which prevented a license or occupation tax in *Brown* v. *Maryland*, a property tax in *Low* v. *Austin* and an occupation tax in *Cooke* v. *Pennsylvania*, 97 U. S. 566, would seem to protect imports in Puerto Rico against a local sales tax on their sale before they had passed through the Customs and been released by the officers of the United States. It is difficult to see any distinction in principle between the present case and the ones just cited. Foreign merchandise is treated in all of them, with the added fact that in the present case not only is the foreign fuel oil not entered through the Customs, but it is actually shipped out of the geographical confines of Puerto Rico while under the supervision of the United States Customs.

The statement in the opinion of the Circuit Court of Appeals that the transaction in the present case receives the protection of the insular laws is difficult to follow. Certainly while the foreign fuel oil involved was in the bonded tanks in process of importation, it was under the exclusive protection of the Federal Government and laws and not under the protection of the insular laws. The contract for sale was made in New York and hence did not come under the protection of the insular laws. The physical delivery of the oil to the ships out of the bonded tanks in Puerto Rico was certainly made under the protection of the Federal laws and under the supervision of the United States Customs officers. There is no point at which the Insular Government furnishes any protection either to the transaction which it pretends to tax nor to the merchandise itself. There is thus nothing for which taxation can be "equivalent" as pointed out by "Cooley on Taxation", 4th Edition, Vol. 1, p. 219. The basic reasoning in a case of this kind is shown by Cooley in the same volume at page 222, where he states:

> "The accidental circumstance that it (the state) may have the means of reaching (the person concerned) can make no difference; there must be an interest in the subject matter of the tax; there must be between the state and the taxpayer a reciprocity of duty and obligation . . ."

POINT III.

The foreign fuel oil here involved delivered to ships' bunkers for use on the high seas out of bonded tanks was "exported" within the meaning of the Revenue Act of 1932 and this definition by Congress is controlling on the insular authorities of Puerto Rico.

A—The fuel oil in question is an "export" so far as the Tariff Act of 1930 and the Revenue Act of 1932 are con-

cerned. It is not contended that such fuel oil was "exported" in the technical sense of the term as defined in the case of *Swan & Finch Co.* v. *United States,* 190 U. S. 143, although the use of the word "export", as a mere sending out of the country without the necessary implication of landing in a foreign country, is not unknown in the precedents, depending upon the particular case. *United States* v. *Chavez,* 228 U. S. 525; *Cunard SS. Co.* v. *Mellon,* 262 U. S. 100. In both of these cases it was implied that the word "export" has a primary meaning which signifies the carrying out of goods from a country without regard to their landing in a foreign country. In the instant case it is the contention of petitioner that the intention of Congress was that fuel oil loaded as ships' supplies *should be treated as exports* and that Congress, in the exercise of its powers over interstate and foreign commerce was within its rights in determining that the word "export" in regard to ships' supplies should be given its ordinary or primary definition rather than its technical definition.

The Tariff Act of 1930 is entitled "An Act to provide revenue, *to regulate commerce with foreign countries, to encourage the industries of the United States,* to protect American labor and for other purposes." 19 U. S. C. A. 1001. (Italics supplied.) Congress may regulate commerce through a taxing act. *Board of Trustees, etc.* v. *United States,* 289 U. S. 48, and the drawback provisions and analogous provisions have been stated to be for the purpose of encouraging manufactures in this country as well as to build up an export trade. *Tide Water Oil Co.* v. *United States,* 171 U. S. 210, 216; 43 Law. Ed. 139. In the title to the Tariff Act of 1930 Congress had asserted that its purpose was to regulate commerce and to encourage the industries of the United States. In the exercise of this power, Congress, in Section 309 of the Tariff Act of 1930 (copied

ante, p. 5) has provided that articles either of foreign or domestic manufacture or production may be withdrawn from bonded warehouses free of duty or internal revenue tax for ships' supplies. Specific mention is made of vessels engaged in trade "between the United States and any of its possessions". In the same section, under the sub-title "Drawback", articles of domestic manufacture or production are considered to be exported for the purpose of the drawback provisions.

The Revenue Act of 1932 (pertinent parts copied *ante,* pp. 7-8), in referring to the tax on articles covered in Section 601(c)(4), which includes fuel oil, states that the tax shall apply only with respect to the importation of such articles and it is specifically stated that these taxes are collectible "unless treaty provisions of the United States otherwise provide". It is further provided in Section 601(b) that with certain exceptions, the taxes shall be levied, assessed, collected and paid "in the same manner as a duty imposed by the Tariff Act of 1930 and shall be treated for the purposes of all provisions of law relating to Customs revenue as a duty imposed by such Act . . ." The Tariff Act of 1930 in turn has incorporated by reference the Customs regulations relating to the entry of merchandise in bonded warehouses and its withdrawal for exportation or transfer to ships' bunkers for use at sea. *McGoldrick* v. *Gulf Oil Corp.,* 84 Law. Ed. 597, 600 (Advance Sheets). When we examine Customs Regulations of 1923, those of 1931 and those of 1937, we find a consistent scheme in consonance with the statutes under which the regulations are made, which operates as a national regulation of foreign commerce. In Chapter XVII of the Customs Regulations of 1923 the different classes of bonded warehouses are provided for in Article 829. Strict superintendence over such warehouses is provided for in Article 830 and others and in Article 883 even the withdrawal of waste products for con-

sumption is provided for and duties must be paid if applicable to such products. The last paragraph of Article 850 provides that imported goods in the warehouses are exempt from state taxes, citing *Low* v. *Austin*, 13 Wall. 29, and other cases in the margin. In the Tariff Regulations of 1931 substantially the same classes of warehouses are provided for in Article 921 in Chapter XVII, which chapter covers the bonding of warehouses. As illustrating how strict is the supervision of the Customs, it is provided in Article 926 that no alterations in the warehouses can be made except with the permission of the Customs authorities. Article 942 corresponds to Article 850 of the Regulations of 1923 and provides that articles in bonded warehouses are not subject to attachment by state courts and are exempt from state taxes. Article 961 relating to the withdrawal of waste products for consumption corresponds to Article 883 of 1923 and shows that these waste products when withdrawn for consumption are treated as having completed their importation course. Articles 455 to 461 of 1931 relate to the entry of merchandise and its withdrawal for disposition either as ships' stores or for re-exportation. Article 461 dealing with the supervision and check on ships' stores taken out of bonded warehouses, provides:

> "The bond given on withdrawal of supplies shall be cancelled upon production of an affidavit of the Master or other officer of the vessel having knowledge of the facts, showing that such supplies have been used on board the vessel, and no portion thereof landed within the limits of the United States or any of its possessions."

Substantially the same provisions are covered in the Customs Regulations of 1937 in Articles 464, 467 and 470.

The statutes referred to and the regulations taken together, are intended to treat ships' stores and supplies as

"exported" and to thus exempt them not only from the federal import duties or internal revenue taxes, but also from all state and local taxes. The history of the Revenue Act of 1932 and its amendments bears out our contention in this respect.

In reporting on the 1933 amendment to the Revenue Act of 1932 the Senate Committee (Senate Report No. 58, 73rd Congress, first session May 1st, 1933) expressed the purpose that Congress had in mind in exempting supplies for vessels.

> "Your committee has inserted a new Section 5 providing for exemption from the manufacturers' excise taxes under the Revenue Act of 1932 of articles sold for use as supplies or equipment on vessels of war, vessels employed in the fisheries or whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. It is believed that this amendment will enable American manufacturers to compete more favorably with their foreign competitors for this business without any substantial loss of revenue since *the effect of the present law is to force purchase abroad.* The bill also provides for allowance of drawback on articles manufactured or produced with the use of merchandise on the importation of which tax has been paid under the Revenue Act of 1932, when such articles are laden for use as supplies on vessels of the classes enumerated. *This also relieves American manufacturers from a competitive disadvantage.*" (Italics supplied.)

The debates on the same section show what was in the minds of the members of Congress (Congressional Record, May 11, 1933, p. 3262).

> "Mr. Harrison: There is also a provision that deals with fuel oils and ship's stores and sea stores.

It was found that many of the vessels which carry on the foreign trade heretofore had bought their fuel oil in this country, but since the passage of the tax act they have changed their practice and are filling their tanks abroad in the ports of foreign countries, and we are losing that trade. A provision is recommended by the committee that in the case of fuel oil, ship's stores, and so forth, as involved *in this class of foreign trade*, the tax shall not be imposed.

"Mr. Reed: Mr. President, the idea is this: At the present time, *ships* under the American flag or foreign flags, *engaged in the various services mentioned here, all have opportunity to buy their fuel oil at foreign ports, and since we have put a tax on that oil they have all been doing it.*" (Italics supplied.)

B—The intention of Congress to treat ships' supplies such as the fuel oil here involved as an "export" is binding on Puerto Rico. This is true from the fact that Congress has plenary control over interstate and foreign commerce, and is reinforced by the plenary control of Congress over Puerto Rico under Article 4, Section 3, Clause 2, of the Constitution. Unless otherwise provided the same federal laws and regulations governing tariffs, customs and matters related thereto, are in effect in Puerto Rico exactly as they are in effect in the several states (48 U. S. Code 739 and the Tariff Act of 1930). It is believed that under the circumstances here set out, no state could make effective a sales tax upon foreign fuel oil taken out of bonded tanks for ships' bunkers (*McGoldrick* v. *Gulf Oil Corp., supra*) and there is no statute or reason known to us why the territory of Puerto Rico should be in a different position from a state in regard to this matter.

The fuel oil here concerned at the time it was pumped into ships' bunkers from the bonded tanks under the supervision of the federal Customs authorities, was exported

within the meaning of the Tariff Act of 1930 and the Revenue Act of 1932 and the provisions of these two acts relating to the status of this oil would necessarily govern and control as to the insular authorities. Otherwise the Insular Government would be able to interfere with and annul the expressed intention of Congress in regard to ships' supplies. Congress intended, as shown by the Committee Report of the Senate and by the debates, *supra* pages 27-28, to encourage the fueling of both foreign and domestic ships in American harbors and it would seem quite evident that a tax by Puerto Rico either upon the foreign fuel oil itself or upon the delivery of the same to ships' bunkers would interfere with that intention of Congress. We believe that even had the fuel oil here involved been brought completely within the country and afterwards laden as ships' supplies by a first sale, it would nevertheless be exempt from the insular excise tax under the same laws and regulations which we have quoted above, but it is not necessary to decide that particular question in view of the fact that this fuel oil never completed its importation but was at all times segregated and at all times maintained its status as an import and under the supervision and control of the United States Customs officers from the time it entered the harbor until it was fully consumed at sea (Article 461, Customs Regulations of 1931, *supra;* Article 470, "Affidavit of Use", Customs Regulations of 1937).

C—A tax on the sale or upon the transaction which moves the foreign fuel oil would be no different in fact and in effect from a tax upon the import itself. See discussion above on this point, pages 19 and 20 of this brief. The *McGoldrick* cases decided by this Court January 29th, 1940 (*McGoldrick* v. *Berwind-White Coal Mining Co.*, 84 Law. Ed. 343 (Advance Sheets); *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 84 Law Ed. 360 (Advance Sheets)) do not decide

any question involved in the present case. In those two cases the goods were domestic to the United States, the orders were taken in the City of New York and the goods delivered in the City of New York, presumably, or at least in part, for consumption there. Under the circumstances of those cases, the tax might be said to be the equivalent of a use tax. See article on the *Berwind-White* case in the Harvard Law Review, Vol. 53, No 6, p. 909. The present case is entirely distinct from those cases in that the merchandise is foreign, it retains at all times its distinctive character as an import, it is under the supervision of the United States Customs officers at all times, and it is consumed by vessels in their propulsion in foreign commerce and in commerce between the United States and Puerto Rico. The present case is quite similar, as pointed out above, to *McGoldrick* v. *Gulf Oil Corporation* and in part to *McGoldrick* v. *Compagnie Generale Transatlantique* decided March 25, 1940, 84 Law. Ed. (Advance Sheets, Pamphlet No. 11).

It may be inferred from the opinion of the Supreme Court of Puerto Rico that no tax can be levied on the oil while it was in the bonded tanks (R. 39, 46). The Court there said:

> "We have hereinbefore stated that the Treasurer did not and does not attempt to levy a sales tax on the fuel oil while it is still deposited in the bonded tank, under the control and supervision of the customs service. *If he were attempting such a thing the case would be easy to decide, since such a tax would be a clear violation of Article I, Section 10, Paragraph 3, of the Federal Constitution,* which prohibits the States from levying taxes or duties on imports or exports." (Italics supplied.)

This, we think, is correct and seems to be in accordance with the previous decisions of the Supreme Court of Puerto

Rico. *Villar* v. *Hansson,* 40 P. R. R. 303. It is difficult to see by what reasoning an excise on the transaction moving such foreign merchandise directly out of the bonded tanks into ships' bunkers for use at sea would be justified, since not only is an excise on the sale of an import equivalent to a tax on the import itself (*Brown* v. *Maryland, supra*), but also to permit the excise would be to allow by indirection what could not possibly be done directly. *Thames etc. Insurance Co.* v. *United States,* 237 U. S. 19; *Helson* v. *Kentucky,* 279 U. S. 245; *Philadelphia etc. SS. Co.* v. *Pennsylvania,* 122 U. S. 326; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261.

POINT IV.

A. The taxation of fuel oil used in propelling ships upon the high seas is an integral part of foreign and coastwise commerce and is a matter of national concern rather than local. Congress has occupied the field through the provisions of the Tariff Act of 1930 and the Revenue Act of 1932.

B. Under the circumstances in this case the tax would directly burden foreign commerce and commerce between the United States and Puerto Rico.

A—If the states and territories were permitted to tax fuel oil in similar conditions to the fuel oil here involved, it would be quite possible and even probable that a great variety of tax rates would apply. The rate in Puerto Rico at present would be 2% *ad valorem,* in New York it might be 4% or 10%, and in San Francisco or New Orleans 50% or 60% *ad valorem.* Our contention here is that the operation of a vessel in foreign commerce or in commerce between

different ports of the United States by passing over the high seas, is a matter of national concern and that it was the intention in framing the Constitution that goods going out of the country, whether true exports or exports in the primary sense of the meaning as leaving the country for consumption elsewhere, should not be subject to the varying desires or whims of the seaboard states. There is no question but what an important item of cost in the operation of a vessel is the cost of fuel supplies and that such cost is a matter which directly affects the cost of exporting goods by a ship. As pointed out above, this bunker fuel oil is carried out of the country and cannot be re-landed here. For the purposes of the Revenue Act of 1932 and the Tariff Act of 1930 it is "exported" and deserves the same protection against state taxation as will be accorded to oil actually landed at a foreign port. This seems to be a logical consideration in accordance with the broader objects which the framers of the Constitution intended to accomplish by prohibiting any tax on exports and by giving Congress the exclusive power to regulate foreign and interstate commerce. Story on the Constitution, 5th Ed., Section 1016, p. 739; *Brown* v. *Maryland, supra; Henderson* v. *Mayor,* 92 U. S. 259, 273, where the Court observed that the law which governed the right to land passengers in the United States ought to be the same in every port. *Cooley* v. *Board of Wardens,* 12 How. 299, 319; *Kelley* v. *Washington,* 302 U. S. 1, 14; *Tide Water Oil Co.* v. *United States, supra; McCulloch* v. *Maryland,* 4 Wheat. 316, 407, 431; *Bowman* v. *Chicago etc. R. R. Co.,* 125 U. S. 465, 481; *Philadelphia etc. SS. Co.* v. *Pennsylvania, supra; Crew Levick Co.* v. *Pennsylvania, supra; Grogan* v. *Walker,* 259 U. S. 80, 90.

As to the control and taxation of ships' supplies for use on the high seas, Congress has spoken its will through the

Revenue Act of 1932 and as to foreign fuel oil, also, through the Tariff Act of 1930. Aside from the fact that such taxation of fuel oil used in foreign commerce and in coastwise trade is a matter of national concern, when Congress has occupied a field which it has the power to occupy, legislation on the same matter by states or territories, if ever valid, is superseded. *Southern Ry. Co.* v. *R. R. Commission,* 236 U. S. 439, 446; *Spokane etc. R. R.* v. *Campbell,* 241 U. S. 497, 511; *Texas & Pacific R. R. Co.* v. *Rigsby,* 241 U. S. 33, 41; *Southern Rwy.* v. *Reid & Beam,* 222 U. S. 444; *Southern Rwy. Co.* v. *Reid,* 222 U. S. 424, 440; *New York Central* v. *Winfield,* 244 U. S. 147; *Mo. Pac. R. R.* v. *Porter et al.,* 273 U. S. 341. Section 601(a) of the Revenue Act of 1932 makes a federal duty on importations of fuel oil expressly subject to the treaty-making power and in Section 630 exempts sales similar to the one here involved. Congress, by means of the two acts mentioned, has legislated positively in regard to a matter which is within its powers and it would seem that the territory of Puerto Rico could not attempt to go into the same field which Congress has occupied and impose restrictions and limitations upon the express will of Congress through a local tax. It cannot be overlooked that if a 2% tax in Puerto Rico on foreign fuel oil under the circumstances of this case is valid, then a 100% tax would also be valid and vessels would be driven inevitably to fuel elsewhere in foreign ports or in continental ports, or in the alternative, foreign freight rates and rates between Puerto Rico and the continental United States would have to be raised. In such case the direct effect on foreign commerce and on commerce between the United States and Puerto Rico would be quickly evident. It would seem beyond question that the taxation of the use of fuel oil (especially foreign fuel oil which never completes its importation) used in propelling

ships on the high seas is inherently a matter of national concern and not subject to local action by Puerto Rico.

B—Under the circumstances of this case, the Puerto Rican tax would directly burden foreign commerce and commerce between the United States and Puerto Rico. In the case of *Thames etc. Insurance Co.* v. *United States,* 237 U. S. 19, it was held that exportation is a *trade movement* and the exigencies of trade determine what is essential to the process of exporting. Then it was held that *marine insurance* is an integral part of exportation and a tax on the policies is essentially a tax on the exportation. Just so in the present case a tax on the sale or delivery of the fuel oil here involved and stored and destined for use and used in the propelling of vessels in foreign and interstate commerce, is a tax either upon "exports" or upon interstate and foreign commerce as such, and in either case is forbidden. The fuel oil was certainly an integral part of the interstate or foreign commerce involved and an absolutely necessary part. In referring to the tax on insurance policies Justice HUGHES said:

> "The rise in rates for insurance as immediately affect exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports, is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries or with distinct or separable subjects; the tax falls upon the exporting process."

In the present case the tax on the oil destined for and used in the propulsion of vessels in interstate and foreign commerce, necessarily burdens directly such commerce.

In the case of *Helson* v. *Kentucky,* 279 U. S. 245, a tax on the sale or use of gasoline in Kentucky was held invalid as to application to the use of gasoline as a means of propul-

sion of an interstate ferry boat. The Court held that the tax upon the use of gasoline in this case burdened interstate commerce although the statute in terms was non-discriminatory and general. In concluding the opinion the Court said:

> "The statute here assailed clearly comes within the principle of these and numerous other decisions of like character which might be added. The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. *And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce.* If a tax can not be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, *it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.'* Gloucester Ferry Co. v. Pennsylvania, supra, page 214." (Italics ours.)

In the case of *Crew Levick Co.* v. *Pennsylvania, supra,* an annual license tax on merchants measured by the volume of business transacted was held to be void as to the part of the tax which was covered by merchandise sales to customers in foreign countries. It was said that the tax in so far as part of it was measured by gross receipts from merchandise shipped to foreign countries, was in fact a regula-

tion of foreign commerce or a tax upon exports and the Court remarked that it was obvious that in a case of that nature "an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms".

In *Philadelphia etc. Steamship Co.* v. *Pennsylvania, supra,* a state tax upon gross receipts of the Steamship Company incorporated under the laws of the state and derived from transportation at sea was held to be a prohibited interference with interstate and foreign commerce. As a practical matter it is difficult to see any difference between taxing the gross receipts of the Steamship Company and taxing bunker fuel oil to be used in propelling the ship in interstate and foreign commerce. See also *Steamship Company* v. *Port Wardens,* 73 U. S. 31, where the State of Louisiana passed a law to the effect that the wardens of the port of New Orleans should receive from each vessel arriving in that port the sum of $5.00 in addition to other fees whether any service was performed or not. This was held to be a prohibited regulation of commerce and also a duty on tonnage. *Clyde Line* v. *Alabama,* 296 U. S. 261; *State Tax Commission* v. *Interstate Gas Co.,* 285 U. S. 41; *Cooney* v. *Mountain States T. & T. Co.,* 294 U. S. 384.

Any state tax which is in substance and effect a tax upon interstate or foreign commerce is not saved by an innocuous name, and even though a tax statute is valid on its face, it will be invalid in its operation if its necessary effect is to lay a burden upon or interfere with interstate or foreign commerce. See Cooley on Taxation, 4th Ed., Vol. 1, page 809 and cases there cited. The ultimate and practical effect of the tax involved in the present case if it is sustained is to place an excise on the use of the fuel oil involved in propelling ships in interstate and foreign commerce. As such the tax is void. *Bingaman* v. *Golden Eagle Lines,* 297 U. S. 626. The circumstances of this case, of course, are much stronger than those in the *Bingaman* case.

POINT V.

A tax under the circumstances of this case is a prohibited duty on tonnage.

A tax upon the fuel supply of a vessel burdens one of the most important items of expense and becomes in fact a tax on the privilege of trading in the port. The tax is not an equivalent charge or a charge of any kind for any service rendered such as wharfage or pilotage and is therefore a duty on tonnage. See *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 264, and the cases there cited and discussed, and *Steamship Co.* v. *Port Wardens*, 73 U. S. 31. In the *Clyde Mallory* case, this Court looked to the practical effect of a charge for the privilege of trading in a port and held that the prohibition against tonnage duties would embrace any tax *regardless of its name or form* which imposed such a charge for the privilege of trading in a port, regardless of the fact that the tax might not be measured by the tonnage of the vessel. The practical effect of the present tax is to impose a very real charge for the privilege of trading in the ports of Puerto Rico. This is prohibited by Article 1, Section 10, Clause 3, of the Constitution of the United States which provides in part as follows:

> "No state shall, without the consent of Congress, lay any duty of tonnage . . ."

Marine Lighterage Corp. v. *Steamship Co.*, 248 N. Y. S. 71. If there were any equivalent service rendered or protection given by the Insular Government, it might be said that this is not a duty on tonnage, but under the circumstances of this case, the tax amounts to such a prohibited tonnage tax.

POINT VI.

The fuel oil involved in this case never left the channels of foreign commerce in contemplation of the law and no transaction connected therewith is taxable.

A—The idea that the sale of the fuel oil here involved is taxable because physical delivery (consummation of the sale) was made within the *geographical* limits of Puerto Rico, is invalid. The petitioner received no protection from the insular laws in anything connected with the sale or delivery of the oil. The contracts of sale were entered into in New York and the invoices made there and payment made there. These contracts were protected by the laws of New York; and the fuel oil under Customs custody and the delivery thereof, under the supervision of the Customs officers, to the ships, was protected exclusively by the laws of the United States. As between Puerto Rico and petitioner, there was at no time any reciprocity of duty or obligation in connection with this oil or the sale thereof, which previously has always been thought necessary as a basis for a tax.

The Supreme Court of Puerto Rico apparently assumed that at the very instant when the oil was flowing through the pipelines to ships, it came within the jurisdiction of Puerto Rico. But as pointed out before, at this time the oil was still under Customs supervision since it was foreign oil, the importation of which had never been completed.

B—The course of the oil involved in this suit is from Aruba, Dutch West Indies, a foreign port, direct to a federally bonded warehouse (tank) under the supervision and control of the United States Customs officers, thence under the same supervision and control to the bunkers of ships for consumption on the high seas in journeys between Puerto

Rico and foreign countries and between Puerto Rico and ports of the continental United States. The actual facts compel the conclusion that this oil never left the channels of foreign commerce where it originated. In *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, in dealing with interstate goods, this Court held that the temporary storage of goods in a domestic port for reasons of expedition or economy preparatory to loading, does not make the goods lose their character as goods in foreign commerce. We copy from the headnotes in this case:

> "1. Goods purchased at interior points for export do not lose their character as goods in foreign commerce and become subject to state taxation because, after shipment to the exporter to a domestic port, they are temporarily stored there for reasons of *expedition* and *economy*, preparatory to their loading on the vessels of foreign consignees. P. 101.
>
> "2. An exporter bought oil in interior States to fill orders from abroad; had it shipped by rail in tank cars to a port in Louisiana, on bills of lading to the exporter at export rates; pumped it from the car tanks into storage tanks at the port; and from these delivered it into the ships of foreign consignees, the title passing from the exporter to them upon such delivery. The oil in each tank car, and as stored, *was not segregated or destined to any particular cargo or shipment abroad;* but it was all bought and held to fill foreign orders previously received; none of it was or could be otherwise disposed of at that port; none of it was subjected to any treatment of manufacture there; and the storage was but a necessary means of securing prompt transshipment and avoiding demurrage charges, by accumulating the oil from the tank cars pending the arrival of a foreign consignee's ship, or to make up a full cargo for one already waiting. *Held that the continuity of the journey was not broken by the storage, and that a Louisiana tax on the oil while so stored was unconstitutional.*" (Italics ours.)

See also *Railway Co.* v. *Sabine Tram. Co.*, 227 U. S. 111; *United States Customs Regulations of 1931*, Section 942, *supra; Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 at p. 292; *Bingaman* v. *Golden Eagle Lines*, 297 U. S. 626; *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583; *Steamship Co.* v. *Pennsylvania*, 122 U. S. 326.

In the *Dahnke-Walker* case a Tennessee corporation purchased grain in Kentucky by contract to be transported to Tennessee. The grain was to be delivered in Kentucky on the cars of a public carrier. The suit arose over a breach of contract, but this Court held in deciding the case that the transaction was in interstate commerce, notwithstanding the contract was made and to be performed in Kentucky, and that the possibility that the purchaser of the grain might change its mind and sell the grain in Kentucky did not affect the nature of the transaction. So here, the fact that the petitioner might have withdrawn some of the oil for local use, did not affect the status of the oil in the bonded tanks which was actually later delivered to the bunkers of steamships.

The present tax certainly cannot be justified as a use tax since the use is wholly in commerce outside of Puerto Rico. *Helson* v. *Kentucky*, 279 U. S. 245. The contract of sale should not be taxable in Puerto Rico since it took place in New York. The only thing occurring in Puerto Rico was the delivery of the oil within the geographical limits of the Island, but this took place under the strict control and supervision of the United States Customs officers. There is no point of time where the Insular Government could make effective any tax upon this fuel oil or upon the transaction moving it. It is evident from the facts of the case that it is impossible for this fuel oil to ever become a part of the mass of property within Puerto Rico and the

fact that the foreign oil here involved, if not "exported" in the strict sense, nevertheless was carried out of the Island, makes necessary the conclusion that at all times it was continuously in the channels of foreign commerce in contemplation of law. *Carson Petroleum Co.* v. *Vial, supra; Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498; *Superior Oil Co.* v. *Mississippi,* 280 U. S. 390; *Robbins* v. *Shelby Taxing District,* 120 U. S. 489.

Even if the tax were a use tax, it would be upon a use so closely connected with foreign commerce as to be a part thereof. In *Henneford* v. *Silas Mason Co., supra,* Mr. Justice CARDOZO observed:

> "A tax upon a use so closely connected with delivery as to be in substance a part thereof, might be subject to the same objections that would be applicable to a tax upon the sale itself."

Here the converse is true. The statute says the tax is upon the sale (the Supreme Court of Puerto Rico construed "sale" as meaning delivery), but upon a sale so closely connected with the use in foreign and other commerce outside Puerto Rico as to be open to exactly the same objections as if the tax had been laid directly upon the use of the foreign oil by the vessels at sea.

C—The interstate or foreign character of the merchandise is not affected by the right of diversion to a local destination when such right is not exercised. All of the foreign oil here involved was actually pumped into ships' bunkers for use at sea. See *Dahnke-Walker Milling Co.* v. *Bondurant, supra.* Neither does the fact that smaller quantities may be taken out for local delivery affect the essential character of the remaining merchandise. *Eureka Pipeline Co.* v. *Hallanan,* 257 U. S. 265; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277; *City of Galveston* v. *Mexican*

Petroleum Corporation, 15 Fed. (2d) 208. In the *Mexican Petroleum Corporation* case it was said:

> "Some stress has been laid upon the fact that a few thousand out of many million barrels of oil pumped in was sold for local use. The law, like other things, goes on common sense and if these small export sales, mainly matters of accommodation as they were, were to be given the effect of changing the character of this oil, it would be a case of the law being made *de minimis*, and not according to reason."

In the *Eureka Pipeline Co.* case the state of West Virginia imposed a tax of 2¢ for each barrel of oil transported by pipelines. Some of the oil was delivered to local destinations in West Virginia and other parts to extra-state destinations. The quantities diverted to local delivery were relatively small. The Court held that the right to divert a portion of the stream of oil did not affect the interstate character of the remainder, saying in this case in part:

> "The bailor assents to its becoming part of a stream that is pouring through and out of the State. Its only right is to call on the pipeline to divert a portion of that stream. So far as the oil that it calls for goes out of the State with the general current it seems to us not to be distinguishable from the rest admitted to move in interstate commerce. No bailor has title to any specific oil, and to deny the character of interstate commerce to the whole stream simply because some one might have called for a delivery that probably would have been made from it in an event that did not happen, is going too far. The charges for gathering and storage seem to us not to affect the case. The storage merely means that enough oil must be kept in the tanks and pipes to satisfy credits. The oil runs into a tank on one side and out on the other. The tank may be regarded as a pipe of larger size. Whether the plaintiff in error

was right or wrong in relying upon state law for its gathering charge its attitude does not matter here.

"As has been repeated many times, interstate commerce is a practical conception, and, as remarked by the court of first instance, a tax to be valid 'must not in its practical effect and operation burden interstate commerce.' It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company not the producer was the master of the destination of any specific oil. Therefore its intent and action determined the character of the movement from its beginning, and neither the intent nor the direction of the movement changed."

In the *United Fuel Gas Co.* case, natural gas was involved and the same holding was made. We quote from the headnote of this case:

"2. Natural gas, collected and purchased by a pipe line company within a State and moving through its pipes, and the pipes of other companies to which it sells it, in continuous streams destined beyond the state, is a subject of interstate commerce, the transportation of which the State may not tax. P. 280.

"3. Held, that the interstate character of the gas so destined was not affected by the right of transporting companies to divert to local destinations, or by the fact that smaller quantities for local delivery were commingled with the other and the proportions between the two were not precisely fixed. P. 281."

The fuel oil here concerned was in process of importation at the time it was shipped out, and the fact that the petitioner had the right to divert a part of the foreign fuel

oil involved by entering it through the Customs and paying the import duty, can not either in logic or in law affect the character of that part of the fuel oil (the part involved in this case) which was actually taken from the bonded tanks under Customs custody for ships' fuel. In *Robbins* v. *Shelby Taxing District, supra,* it is pointed out:

> "But in making such internal regulations a state cannot impose taxes . . . upon property imported into the state from abroad . . . and not yet become part of the common mass of property therein . . ."

In *Railway Co.* v. *Sims,* 191 U. S. 441, 449, this Court said:

> ". . . we have uniformly held that states have no power to tax . . . goods imported from foreign countries . . . before they have become commingled with the general property of the state and lost their distinctive character as imports."

Conclusion.

It is respectfully submitted that the fuel oil involved in this case was never at any time within the jurisdiction of Puerto Rico and at all times had kept its distinctive character as an import and that a transaction moving such foreign fuel oil from federally bonded tanks to the bunkers of ships for use in foreign commerce and in commerce between Puerto Rico and the continental United States cannot be taxed by Puerto Rico in any form or under any guise. It is further submitted that since the deliveries and even the consumption of the fuel oil were under the control and supervision of the United States Customs officers, there was never an instant when the Puerto Rican laws could reach such oil.

It is further submitted that within the meaning of the Tariff Act of 1930, the Revenue Act of 1932 and the Customs Regulations controlling this oil at all times, the oil

when laden as ships' supplies was "exported", and that such meaning of "export" established by federal laws is binding upon the Government of Puerto Rico and no local tax can be laid upon the transaction moving the oil. The whole body of applicable Tariff and Revenue laws and regulations applicable show that the clear intention of Congress was that oil under the present circumstances should not be taxed by any local governments. *McGoldrick* v. *Gulf Oil Corporation, supra.*

If the Puerto Rican *ad valorem* tax here attempted to be levied should be made effective, it would constitute, in fact, a burden upon foreign commerce and a tax upon foreign merchandise still in the course of importation or still in the channels of foreign commerce and would be equivalent to a prohibited tax on tonnage. It would permit the Government of Puerto Rico to hinder and frustrate the declared purpose of Congress in a field of national concern and subject to national control.

The judgment of the United States Circuit Court of Appeals for the First Circuit entered December 15th, 1939, should be reversed.

Dated at San Juan, Puerto Rico, September 16th, 1940.

Respectfully submitted,

JAMES R. BEVERLEY,
Attorney for Petitioner,
San Juan, Puerto Rico.

FILE COPY

Supreme Court of the United States

October Term 1940

No. 26

WEST INDIA OIL COMPANY (PUERTO RICO),
Petitioner,

vs.

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Respondent.

PETITIONER'S MOTION TO SUBSTITUTE MANUEL V. DOMENECH, TREASURER OF PUERTO RICO FOR RESPONDENT, RAFAEL SANCHO BONET, FORMER TREASURER.

JAMES R. BEVERLEY,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term 1940

No. 26

WEST INDIA OIL COMPANY (PUERTO RICO),
Petitioner,

vs.

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Respondent.

MOTION OF PETITIONER TO SUBSTITUTE MANUEL V. DOMENECH AS RESPONDENT IN PLACE OF RAFAEL SANCHO BONET.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The motion of Petitioner, West India Oil Company (Puerto Rico) made through its undersigned attorney shows the Court:

1. That this declaratory judgment suit was brought in the District Court for the Judicial District of San Juan, Puerto Rico, against respondent Rafael Sancho Bonet in his official capacity only, as Treasurer of Puerto Rico.

2. That subsequent to the granting of certiorari by this Court in this case, to wit on May 17, 1940, the said respon-

dent Rafael Sancho Bonet ceased in the office of Treasurer of Puerto Rico.

3. That thereafter and on the 18th day of May 1940, Manuel V. Domenech was duly appointed Treasurer of Puerto Rico and qualified as such and has been acting as such since the said 18th day of May 1940.

4. Petitioner avers that the said Manuel V. Domenech as Treasurer of Puerto Rico has adopted the action of his predecessor in office in attempting to collect from Petitioner the taxes complained of in the Amended Petition or Bill of Complaint herein; that there is a substantial need for the continuance of this proceeding until judgment by this Court, in that exactly the same controversy exists between Petitioner and Manuel V. Domenech the present Treasurer of Puerto Rico as existed between Petitioner and Rafael Sancho Bonet, former Treasurer; and that the ends of justice will be best served by continuing the present case to final determination by this Court.

WHEREFORE Petitioner respectfully moves under Rule 19 of this Court and in accordance with Section 11 of the Act of Congress of February 13, 1925 (43 Stat. 941; 28 U. S. C. A. 780), that the Court order the substitution of Manuel V. Domenech, Treasurer of Puerto Rico, for Rafael Sancho Bonet, former Treasurer of Puerto Rico, as Respondent herein and that the cause be permitted to thus proceed to hearing and judgment.

San Juan, Puerto Rico, September 4, 1940.

JAMES R. BEVERLEY,
Attorney for Petitioner, West India Oil Company (Puerto Rico)

I certify that on September 9, 1940, three copies of the above motion were deposited in the United States Mail at New York, N. Y. addressed to William C. Rigby, Esq., attorney for the Treasurer of Puerto Rico, Southern Building, Washington, D. C., with the proper amount of postage affixed.

JAMES R. BEVERLEY,
Attorney for Petitioner.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 782 26

WEST INDIA OIL COMPANY (PUERTO RICO),
Petitioner,

vs.

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM CATTRON RIGBY,
Attorney for Respondent.

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Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior,
Of Counsel.

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No. 782

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS OF THE COURTS BELOW

The opinion of the insular District Court of San Juan ("Statement of Facts, Opinion and Judgment", R. 15-22) is not officially reported. The opinion of the Supreme Court of Puerto Rico, reversing the District Court and upholding the tax in question (R. 33-49), is reported in 54 P. R. Dec. 732 [Spanish edition, Advance Sheets, July 1, 1939]. It has not yet appeared in the English edition of the Puerto Rico Reports. The opinion of the Circuit Court of Appeals, affirming that of the insular Supreme Court (R. 55-59), is reported in 108 F. (2d) 144.

JURISDICTION

Jurisdiction exists in this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

QUESTION PRESENTED

The question is whether Puerto Rico may validly levy against a domestic corporation of the Island, organized under its insular corporation laws, its excise tax,[1]

> "on the sale of any articles the object of commerce, * * and at the time of the sale in Puerto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale",

on account of sales of oil made in Puerto Rico by the local corporation, The West India Oil Company (P.R.), to American steamship companies for use in the propulsion of their ships plying between Puerto Rico and mainland ports, and consummated by pumping the oil at San Juan into the steamships out of "bonded tanks" where the company had been holding it in storage [indiscriminately for sale and delivery either in foreign commerce or for local consumption in the Island, or for consumption, as in the present case, by American flag vessels in their voyages between the Island and the mainland]. It appears that the company had brought the oil from Aruba, Dutch West Indies, to Puerto Rico, where it had stored it in warehouses owned by the company, but which had been bonded by the Federal government at the company's request; and the particular oil sold for particular usages, as, for example, for local consumption or, as here, for the propulsion of ships to the mainland, was not segregated from the mass in the tanks, until it was pumped out at the company's request under the supervision of the Federal officials.

The Federal customs duties are remitted on oil thus sold for the propulsion of the ships between the Island and the mainland.[2]

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[1] Section 62 of the Internal Revenue Act of Puerto Rico as amended by Act. No. 17 of June 3, 1937; Appendix II, *infra*, p. 42.

[2] Sec. 309, 46 Stat. 590.

The insular District Court of San Juan thought the insular excise tax could not validly be levied on the company's act of selling the oil under these circumstances. The Supreme Court of Puerto Rico, however, took a different view. It reversed the District Court, and sustained the tax. The Circuit Court of Appeals agreed with the insular Supreme Court, and likewise sustained the tax. The company has brought this petition for certiorari, urging substantially the same contentions as in the lower courts. Respondent believes that the insular Supreme Court and the Circuit Court of Appeals were right; that the tax was validly levied against this domestic corporation in the Island as an excise tax on this business activity of selling the oil within Puerto Rico; and that the petition for certiorari should be denied.

A. *This case does not deal with foreign commerce, nor with sales of oil to ships for their propulsion in foreign commerce or to foreign countries.* It is not within the doctrine of *McGoldrick* v. *Gulf Oil Corporation*, No. 473 at the present term, decided March 25, 1940; but, on the contrary, is ruled by *McGoldrick* v. *Berwind-White Coal Mining Co.*, No. 475 at the present term, decided January 29, 1940,[3] in connection with *Newark Fire Insurance Co.* v. *State Board*

[3] Since it deals only with sales for propulsion of ships in interstate commerce between the Island and the mainland; and not at all with foreign commerce; and the sale in Puerto Rico and delivery to the American ships for consumption in domestic commerce between the Island and the mainland removed the oil from the stream of foreign commerce, and mingled it with the mass of the company's property held for sale in the Island, and the imposition of the excise tax on the company's activity in making the sale results in no practical disadvantage whatever in the carrying on of interstate commerce between the Island and the mainland; but, on the contrary, the exemption of this

of Tax Appeals of New Jersey, 307 U. S. 313, 318, 322, 323-324, and *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 328, *et seq.*;[4] *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, and *Loiza Sugar Co.* v. *People of Puerto Rico,* 57 F. (2d) 705, 706 [C.C.A.-1], certiorari denied, *ibid, Loiza Sugar Co.* v. *Puerto Rico,* 287 U. S. 632;[5] *People of Puerto Rico* v. *Shell Co.,* 302 U. S. 253, and *People of Puerto Rico* v. *Rubert Hermanos, Inc.,* No. 582 at the present term of this Court, decided March 25, 1940;[6] *Swan & Finch Com-*

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local company from paying the excise tax on making sales of oil it had brought in from a foreign country [Aruba] and was holding for sale in the Island would work a plain discrimination against companies bringing oil to the Island from the mainland for such sales [as for example, from Texas], and would place the dealers in Texas oil or other mainland oils at a distinct disadvantage in competing for this interstate trade; and would moreover violate the requirement of the Congress in the Organic Act for Puerto Rico [Sec. 2, *infra,* Appendix II, p. 39] "That the rule of taxation in Puerto Rico shall be uniform".

[4] The power of the Legislature extends to levying an excise tax on the business activity of a domestic corporation of Puerto Rico, regardless of whether or not the subject of those activities is properly located within the territorial limits of Puerto Rico; so that it is really immaterial here whether the oil while deposited by the petitioner in the bonded warehouse, subject to joint supervision with the Federal authorities, is to be regarded as *pro tanto* withdrawn from the territorial jurisdiction of Puerto Rico.

[5] That this tax on the domestic company's act of making the sale is an excise tax upon this business activity of this local domestic corporation.

[6] That the Legislature of Puerto Rico, as the delegate of the Congress, possesses all local legislative powers [including the taxing power], except as expressly limited by act of Congress; and that it is no objection to the exercise of such local legislative powers that the Congress may itself have legislated in the same field.

pany v. *United States*, 190 U. S. 143, 145[7]; and *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 518-522.[8]

STATEMENT

Petitioner's "Summary Statement" (*Petition*, p. 3) and also its statement of the "Questions Presented" (*Petition*, pp. 2-3) are incomplete, and somewhat inaccurate. Petitioner omits **essential facts**; viz. that:

A.—*The sales were made in Puerto Rico* [and not in New York, or elsewhere] as was correctly held by the Supreme Court of Puerto Rico, in construing, as a matter of *local law*, the requirement in this local taxing statute [Section 62 of the local Internal Revenue Act of Puerto Rico, *supra*], and affirmed by the Circuit Court of Appeals [*infra*, pp. 6-7].

B.—*The sales were made wholly for propulsion of ships in domestic commerce*, in voyages between the Territory of

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[7] That fuel oil delivered to ships for use in their propulsion between the Territory of Puerto Rico and the mainland was not an "export", nor used in foreign commerce; but that, as the Court of Appeals correctly said in the present case (R. 58-59; 108 F. (2d) 144, 147):

> "But the fuel oil was not destined for a foreign port. As stated in *Swan & Finch Company* v. *United States*, 190 U. S. 143, 'whatever primary meaning may be indicated by its derivation, the word "export" as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country.' We do not regard the oil put aboard for consumption at sea as 'exports' within the meaning of Section 3 of the Organic Act of Puerto Rico."

[8] Property held in storage awaiting sale becomes a part of the common mass of property in the State [Territory].

Puerto Rico and the mainland; and not at all for any foreign voyages, or for foreign commerce in any respect.[9]

OPINION OF THE CIRCUIT COURT OF APPEALS

As above stated, the Circuit Court of Appeals upheld the opinion of the Territorial Supreme Court, which had upheld the tax. It is believed that the Circuit Court of Appeals was right, for the reasons stated in its opinion (R. 55-59, *supra*; 108 F. (2d) 144). Moreover its decision affirming the determination of the insular Supreme Court construing the phrase *"at the time of the sale in Puerto Rico"* contained *in the local insular statute* [Section 62 of the insular Internal Revenue Law; Appendix II, *infra,* p. 42], and holding *that within the meaning of that insular statute the sales involved in the present case were made in Puerto Rico* (and not in New York, or elsewhere), is in accordance with the established rule of the respect to

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[9] It is true that the "stipulation" prior to the trial (R. 14) spoke of delivery of the oil

> "to ships plying between Puerto Rico and ports of the United States and between Puerto Rico and foreign ports";

but upon the trial the only witness called was the Petitioner-company's own witness, its assistant manager, Mr. Charles H. Lee, Jr. (R. 23-31), and Mr. Lee testified that the oil in question was all delivered for use in the propulsion of ships in *voyages between the Island and the United States mainland.* His testimony is, on direct examination (R. 24):

> "Q. 9. Does the West India and its predecessor in Puerto Rico have a bonded tank for fuel oil? A. Yes, sir.
>
> "Q. 10. When was that tank bonded? A. In December, 1932.
>
> "Q. 11. What is the exact date? A. December 3.
>
> "Q. 12. What was that tank bonded for? A. To store fuel oil, which is used largely by the steamers plying between Puerto Rico and the States".

be accorded to decisions of the local Territorial Supreme Court construing local Territorial law. *Sancho Bonet, Treasurer* v. *Yabucoa Sugar Co.*, 306 U. S. 505; *Sancho Bonet, Treasurer* v. *Texas Company*, No. 132 at the present term of this court, decided January 2, 1940.

BRIEF OF AUTHORITIES APPENDED

We venture to append here, in support of our position and of the opinion of the Circuit Court of Appeals, a copy of our brief in the present case in the Circuit Court of Appeals [Appendix I, *infra*, pp. 9-38], dealing with the same questions which petitioner raises here, as it did in that court and in the insular Supreme Court.

And again on cross-examination (R. 28):

"X-Q. 50. Where was the oil delivered? A. It was delivered from the tanks in our plant to the bunkers of the steamers.

"X-Q. 51. Where are those tanks located? A. In Puerta de Tierra.

"X-Q. 52. Here in San Juan? A. Yes, sir.

"X-Q. 53. And the delivery of the 46 million gallons to which the complaint refers, was made in San Juan, Puerto Rico? A. Yes, sir.

"X-Q. 54. And the fuel oil delivered to those ships, was used by them in their trips between ports of Puerto Rico and the United States? A. Yes, sir.

"X-Q. 55. This oil was not to be used during trips to other countries? A. No, sir.

"X-Q. 56. And the oil was not brought from Aruba in transit to other countries? A. No, sir.

"X-Q. 57. Does this mean that the 46 million gallons of oil were drawn from the tanks that the company has in that manner . . . ? A. Yes.

"X-Q. 58. But the oil was not given away gratis? A. No, sir.

"X-Q. 59. Then, how was it delivered? A. The oil was sold."

CONCLUSION

The petition presents no question of importance not already settled by this Court. The decision of the Circuit Court of Appeals, affirming that of the insular Supreme Court, was right; and should not be disturbed. The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX I

BRIEF OF RESPONDENT, AS APPELLEE IN CIRCUIT COURT OF APPEALS

STATEMENT

This was a petition ("Amended Petition", R. 1-6) in the insular District Court for the District of San Juan, Puerto Rico, brought by the West India Oil Company (P. R.), a corporation of Puerto Rico, the appellant here, against the Treasurer of Puerto Rico, the appellee here, for a declaratory judgment. The gist of the prayer (R. 5-6) is that Sections 62 and 16(a)[1] of the Internal Revenue Law of Puerto Rico be so interpreted as not to authorize the imposition of the insular two percent *ad valorem* sales tax "on the fuel oil exported by the plaintiff for use on the high seas, as described in paragraph four of this complaint" [R. 2-3], or, in the alternative,

> "that if Sections 62 and 16(a) tend to authorize the fixing and collection of the two percent *ad valorem* tax on the fuel oil drawn from bonded tanks under the jurisdiction of the Federal Government, for re-shipment and use on the high seas, then that such provisions are null and void in so far as they tax the fuel oil exported for use in the high seas".

The insular District Court entered judgment in favor of the plaintiff ("Statement of Facts, Opinion, and Judgment"; R. 15-22) interpreting the insular statute substantially in accordance with plaintiff's contention ("Judgment", R. 21).

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[1] Section 16(a) is not really involved. The tax is levied solely under Section 62. (Treasurer's Answer, Par. 3, R. 10; Opinion of insular Supreme Court, R. 34.)

The insular Supreme Court reversed the District Court ("Opinion", R. 33-49; Judgment, R. 49-50), and upheld the tax. The plaintiff company appeals.

OPINION OF THE SUPREME COURT

The Supreme Court's opinion, delivered by MR. JUSTICE TRAVIESO, concisely states the case as follows ("Opinion", *supra*, R. 33-35; *Italics are those of the court itself*):

> "This suit was filed under the provisions of Act No. 47 of April 25, 1931, to obtain a declaratory judgment in regard to the rights of the litigants.
>
> "The plaintiff, the West India Oil Company (P. R.), is a domestic corporation engaged in importing, purchasing and selling oil and products derived from the same. In connection with said business and to facilitate the sale and delivery of said products to purchasers, the plaintiff set up and maintained a bonded tank in the City of San Juan, Puerto Rico, in keeping with the Federal statutes (46 Stat. 743; 19 U. S. C. A., sec. 1555); said tank was used to receive and deposit fuel oil brought from foreign countries to Puerto Rico. The oil thus deposited remains in the tank for an undetermined period of time until it is (a) re-exported to a foreign country; or (b) delivered to the steamers that purchase it to be used as fuel for their engines; or (c) delivered to purchasers for use in Puerto Rico. While it remains in the bonded tank, the oil is under the control of the Customs Service of the Federal Government.
>
> "From December 1932, through August 1935, the plaintiff corporation drew about 46,000,000 gallons of fuel oil from said bonded tank and delivered them to the steamers which had purchased it for use in their trips to the Continent[2] and to foreign countries.
>
> "The Treasurer of Puerto Rico maintains that the oil thus delivered to said steamers in Puerto Rico is subject to a tax of 2 percent *ad valorem*, which in the

[2] *Id est*, the United States mainland.

present case amounts to $26,500, more or less. To impose said tax the Treasurer relies on the provisions of Section 62 of the Internal Revenue Act of Puerto Rico, as it was amended by Act No. 17 of June 3, 1927, which reads as follows:

> 'Section 62. There shall be levied and collected, once only, on the sale of any articles the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, *and at the time of sale in Porto Rico,* a tax of two (2) percent on the price or value of the daily sales of such articles, *whether such sales are for cash or credit,* which tax shall be paid at the end of each month *by the person making such sale.*' (Italics supplied.)

"The plaintiff corporation maintains that Section 62, *supra,* is not applicable to the oil taken out of the tank and delivered to the steamers, for the following reasons:

"1st. Because said oil never enters into Puerto Rico nor does it become property within the territory, since said tank is somewhat in the nature of a *tax-free zone,* not subject to the control of the Insular Government, but under the exclusive control of the Federal Government, said oil never being subject to the tax laws of Puerto Rico.

"2nd. Because the tax imposed would be an export[1] tax, prohibited by Section 3 of the Organic Act of Puerto Rico.

"3rd. Because said tax is a direct burden on interstate and foreign commerce and as such is not included in the powers of the Insular Legislature.

"4th. Because the fuel oil was still in foreign commerce when it was delivered to the steamers for use on the high seas.

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[1] Erroneously printed "import" in the transcript of the record here (R. 34).

"The District Court of San Juan decided that said oil had never acquired a taxable *situs* in Puerto Rico and therefore rendered judgment in favor of plaintiff. The defendant appealed. He alleges that the District Court has erred specifically in upholding each of the four reasons set forth by the plaintiff corporation against the imposition of the tax; and has committed a fifth error, in awarding costs to plaintiff.

"To complete the above findings of fact we should state that according to the testimony of Mr. Lee, assistant manager of the plaintiff corporation, the contracts for the sale of oil are signed in New York by the steamship company and the Standard Oil Company of New York; the latter notifies the plaintiff corporation that said contracts have been signed and the oil is delivered by said corporation to any ship of the purchaser steamship line that requests it. Mr. Lee also testified that when a delivery of oil is to be made, the plaintiff notifies the customs office, which inspects the valves of the tank to see that the seals have not been broken and supervises the delivery, and notes the amount delivered; that the bills and payments are made in New York; that when the oil comes from Aruba the amount to be used locally is nowhere stated, nor the amount that is to be delivered to the ships, nor the amount that is to be reexported, but that it all comes together and is thus deposited in the tanks; that the tanks are situated in the Ward Puerto de Tierra, of San Juan; that when delivery of the oil is made to the ships *the contract of sale is entered into in New York, but the oil is delivered in San Juan.*"

The contention last noticed in the above quotation, that the sales must be considered as, in legal effect, made in New York rather than in Puerto Rico, together with the four contentions listed in the four numbered paragraphs earlier in the Supreme Court's opinion (*ante*, pp. 11), are substantially the same contentions that appellant now presents here. ["Errors Relied Upon and Appellant's Position, Brief, pp. 5-6].

Further on in its opinion the insular Supreme Court found (R. 40):

> **"The complainant corporation has not considered it necessary to show us copies of the contracts entered into in New York between it and the steamship companies.** In fact, it has not even referred to said contracts in its amended petition. The fact of the existence of said contracts was first brought forth in the testimony of Mr. Lee,[4] to which we have referred. And if we accept said testimony in its entirety, the only thing that we can get out of it is that they were simply contracts entered into and signed in New York for the sale of a certain amount of fuel oil situated in Puerto Rico,[4-(a)] which was to be taken from the tanks of the corporation, measured and delivered at the dock in Puerto Rico to the ships of the purchasers when these should request it." (*Emphasis supplied*)

BASES OF INSULAR SUPREME COURT'S OPINION

The bases of the insular Supreme Court's opinion (R. 35-49) may be summarized as follows:

1. The lower court (the insular District Court of San Juan) was in error in considering the bonded tank belonging to this private corporation as "a tax-free zone or a Federal Zone and as such as beyond the control or jurisdiction of the Insular Government, merely because employees of the Federal Government supervise and inspect the deposit and withdrawal of the fuel oil". Such a privately owned tank, although it has been designated as a "bonded warehouse" under Section 555 of the United States Tariff Act of 1930 [Appendix II, *infra*, p. 41] is *not* United States

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[4] Mr. Lee's testimony in question and answer form; R. 23-31.

[4-(a)] May have been simply contracts for the steamship companies' "requirements" over a period of time.

Government land subject exclusively to federal jurisdiction, as is a military reservation or other reservation to which the Federal Government has acquired title *with the consent of the State legislature* so as to vest exclusive jurisdiction in the federal Government under the Constitution [Art. I, Sec. 8, Cl. 17]. No such question arises here.[5]

After examining [R. 36-38] decisions relating to federal jurisdiction over military and other federal reservations, and as to other federally owned property [*Surplus Trading Co.* v. *Cook*, 281 U. S. 647; *Commonwealth* v. *Clary*, 8 Mass. 72; *Mitchell* v. *Tibbetts*, 17 Pick. 298; *United States v. Cornell*, 2 Mason 60, Fed. Cas. No. 14,867; *State ex rel. Jones* v. *Mack*, 62 Am. St. Rep. 811; *Ft. Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525; *United States* v. *Unzeuta*, 281 U. S. 138; *Standard Oil Co.* v. *California*, 291 U. S. 242; *People* v. *Suarez*, 51 P. R. Rep. .... (51 P. R. Dec. 903, Spanish edition, not yet published in English)], the insular Supreme Court concludes (R. 38-39):

> "After a thorough study of the above cited cases we feel bound to declare untenable the contention that a bonded tank belonging to and constructed on private property in Puerto Rico of a corporation, is a tax-free zone or Federal property, over which the Insular Legislature has no jurisdiction whatsoever, for the only reason that employees of the Customs Service control and inspect the movement of the fuel oil deposited in said tank to facilitate the business of the corporation."[6]

2. The court then points out (R. 39) that the question

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[5] Appellant really admits this, in its brief in this court [*Brief*, p. 11]. It makes no attempt, in this court, to defend the opinion of the District Court in this respect. All that part of appellant's contentions in the insular courts appears now to be abandoned in this court.

[6] *Confer* 22 Ops. Atty. Gen. [U. S.] 152 [1898].

r decision is *not* whether the insular Legislature has pow- to impose a tax on fuel oil while deposited in bond in the nks of the West India Oil Co.; that there is no allegation the plaintiff's complaint of the Treasurer having ever ied to impose any such tax; but that the question for ecision is simply (R. 39):

> "Is the Treasurer of Puerto Rico legally authorized to impose and collect the 2 percent tax provided for by Section 62, *supra*" [Sec. 62, Internal Revenue Law of Puerto Rico], "on the price of the fuel oil that the plaintiff corporation bound itself to sell by a contract entered into in New York, which oil was to be delivered" [and actually was delivered] "at the dock in Puerto Rico by pumping it from the tanks to the ships of the purchaser corporations?"

nd that the question depends for its solution on the inter- retation of the phrase used in that section of the statute *Appendix II, infra,* p. 42], "at the time of sale in Puerto ico". [Spanish: *"al tiempo de verificarse la venta en uerto Rico";* Laws of 1927, at pp. 473-475].

3. The court says (R. 39) further:

> "We accept as an indisputable premise that the fuel oil is an article of commerce the sale of which if it is consummated in Puerto Rico is subject to the payment of the tax. And if the other premise, that is that the sale of the oil was consummated in Puerto Rico, is established, we would be forced to the inevitable conclusion that the Treasurer was correct in applying the statute to it."

The court then (R. 39-40) states the appellant corpora- on's contention that:

> "as the contract of sale was entered into, the bills made and the oil paid for in New York, the sale must be considered *consummated* in New York and not in Puerto Rico; and that the fact that at the moment when the sale was carried out the oil was in Puerto Rico, where

delivery was made to the purchaser, does not authorize the Treasurer to impose the 2 percent tax on said sale."

And, after stating the Treasurer's contrary contention that, for the purposes of this tax, *"a sale is consummated where the delivery of the thing sold is made"*, and after commenting on the fact that *this plaintiff corporation "has not considered it necessary to show us copies of the contracts between it and the steamship companies"* and *"In fact, it has not even referred to said contracts in its amended petition"* [R. 40, quoted *ante*, p. 13], and, after pointing out that, as above quoted (*ante*, p. 13) even the fact of the existence of those contracts was first brought out in the testimony of Mr. Lee, the court proceeds (R. 40-41):

> "And if we accept said testimony" [of Mr. Lee] " in its entirety, the only thing that we can get out of it is that they were simple contracts entered into and signed in New York for the sale of a certain amount of fuel oil situated in Puerto Rico, which was to be taken from the tanks of the corporation, measured and delivered at the dock in Puerto Rico to the ships of the purchasers when these should request it.
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> "We have no doubts that the contracts between the oil corporation and the steamship companies were perfected from the moment they were signed in New York, the contracting parties having agreed as to the thing object of the contract and as to the purchase price, without requiring the previous delivery of one or the other. Section 1339 of the Civil Code, 1930 ed. The agreement in regard to the object and the purchase price is sufficient to constitute a valid contract of sale binding as between the purchaser and the vendor, the former having an action to demand the delivery of the thing sold to him and the latter to claim the payment of the price agreed upon.
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> "However, we are not trying to determine the rights and obligations as between the purchaser and the vendor, but the obligation that a vendor who consummates" [Spanish: *"verifica"*; 54 P. R. Dec., at p. 742; Advance Sheets, July 1, 1939] "a sale of an object of commerce

within the limit of a state enters into with a third party, the state.

"Manresa, in his Commentaries to the Spanish Civil Code, in dealing with *the perfection* and *the consummation* of a contract of sale says as follows:

> 'From the moment of agreement, and without any other requisite, the contract, we repeat, is perfected and the obligations of the parties arise; but the transmission of the property does not exist until the thing has been delivered. The delivery of the thing refers to the consummation; the section which we are studying merely states the moment in which the contract is perfected . . .
>
> We said that the generally accepted rule sustains the doctrine of the transmission of the property merely by agreement and without the necessity of the previous delivery of possession, and that, *on the contrary, our* code still requires said requisite to consider the property transmitted.' [*Italics are the court's*] 10 Manresa, page 60, 2d ed.

"And the Commentator Scaevola says:

> 'All these considerations lead us to declare as a consequence *that the transmission of the title of the thing sold from the vendor to the purchaser takes effect at the time when the contract is consummated and not simply when it is perfected.*' [*Italics are the court's*] 23 Scaevola, 318.

"The same doctrine has been upheld by this court in *Olivari* v. *Bartolomei*, 2 Judgments of the Supreme Court of Puerto Rico 79; *Capo* v. *S. A. Panzardi & Co.*, 44 P. R. R. 225; and *Benitez Flores* v. *Llompart*, 50 P. R. R. . . . ." [50 P. R. Dec. (*Spanish Ed.*) 670] "See: Section 549 of the Civil Code, 1930 ed."

After citing (R. 41-42) decisions in a number of the States along the same lines as the Puerto Rico law, the Court adds (R. 42-43):

"In the present case **the title or right of property** could not be transmitted to the purchaser **until the oil was taken from the tank, measured** and delivered to the ships.

> 'But the acceptance of the delivery order will not transfer the property if something remains to be done, such as weighing or measuring, to identify the goods or ascertain the quantity sold.' 55 C. J. 562. See pages 530-542.
>
> "See: *Iron City Grain Co.* v. *Arnold*, 215 Ala. 543, 112 So. 123. *Lopez & Moran* v. *Sobrinos de Ezquiaga*, 34 P. R. R. 75.
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> "In accordance with the authorities cited we must arrive at the conclusion that the contract or promise of sale entered into in New York was not consummated until the oil was extracted from the tank, measured and delivered to the ships in their tanks. (*Emphasis supplied*)

Quoting from definitions in the "Dictionary of the Spanish Language" the court (R. 43) overrules the plaintiff's contention that the provision in Section 62 of the statute that the tax is to be imposed and collected "at the time of sale in Puerto Rico" ["al tiempo de *verificarse la venta* en Puerto Rico"; *cf.*, *ante*, p. 15] means "when the contract was entered into or perfected", rather than when the sale is consummated by delivery. The court holds that the language of the statute refers to the "carrying out or accomplishment of an act", and concludes its discussion of this part of the case by saying (R. 43):

> "We are, therefore, of the opinion, and we so decide, that in providing in Section 62, *supra*, that the 2 percent tax shall be imposed and collected 'at the time of sale [*"de verificarse la venta"*] in Puerto Rico' and that said tax shall be paid 'by the person *making* such sale', the legislator had the intent to and meant to impose the tax at the place of and at the moment when the sale was consummated by the delivery to the purchaser of the thing sold, without taking the manner of paying the purchase price into consideration, since the tax is made applicable to all sales whether 'for cash or on credit'. To sustain the opposite would be to make the evasion of the tax a simple matter, in New York as well as in Puerto Rico, since the courts of that state have held that the tax may not be levied when the thing

> object of the contract is delivered out of the city of New York even though the contract is entered into or signed in said city. *United Artists Corporation* v. *Taylor,* 7 N. E. (2d) 254, 273 N. Y. 334, affirming 248 App. Div. 207."

3. The court overrules [R. 44 ("2")] the plaintiff corporation's contention that the tax levied by the Treasurer on oil delivered to the ships for their own consumption,—[mostly at least to American flag ships plying between Puerto Rico and the United States mainland in the coastwise shipping trade between United States ports, San Juan and New York or Baltimore or others],—is an "export duty" prohibited by Section 3 of the Organic Act (Appendix II, *infra,* p. 39). The court, in holding that such delivery of oil to the ships, to be consumed in their own propulsion, is not an "export", within the meaning of Section 3 of the Organic Act, and in overruling plaintiff's contention that it is then "still in foreign commerce when it was delivered to the ships to be used on the high seas", points out that the ordinary meaning of the word "export" as used in the Constitution and laws of the United States is "the *transportation* of goods from this country *to a foreign country*", and quotes what the United States Supreme Court said in *Swan and Finch* v. *United States,* 190 U. S. 143, 145:

> "It cannot mean simply a carrying out of the country * * *. Nor would the mere fact that there was no purpose of return justify the use of the word 'export'. *Coal placed on a steamer in San Francisco to be consumed in propelling that steamer to San Diego*[7] *would never be so designated.* Another country or State as the intended destination of the goods is essential to the idea of exportation." (*Italics supplied*)

4. Replying to plaintiff's invocation of the "commerce

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[7] [Oil pumped into a steamer in San Juan to be consumed in propelling that steamer to New York].

clause" of the Constitution, and its contention that the levy of this tax on the oil delivered in Puerto Rico to the ships to be consumed in their own propulsion [between San Juan and other United States ports, mostly mainland ports] "constitutes a direct burden on interstate and foreign commerce" and therefore that the Legislature of Puerto Rico "has no authority to impose said tax", the court, without reference to the fact that the "commerce clause" is not applicable to Puerto Rico, which is not one of the States of the Union,[8] overrules plaintiff's contention (R. 44-46 ["3"], and holds that the imposition of this excise tax on this domestic corporation of Puerto Rico, upon its sales to these ships of oil for their own consumption, is *not* a direct burden on interstate or foreign commerce, within the decisions of the United States Supreme Court [*Kelley* v. *Rhoades,* 188 U. S. 1; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 518-522; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Susquehanna Coal Co.* v. *South Amboy,* 228 U. S. 665; *Bacon* v. *Illinois,* 227 U. S. 504; *Brown* v. *Maryland,* 12 Wheat. 419; *May* v. *New Orleans,* 178 U. S. 496; *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362; and *Eastern Air Transport* v. *South Carolina Tax Commission,* 285 U. S. 147, 150-153; together with the Minnesota decision in *State* v. *Maxwell Motor Sales Corp.,* [Minn.], 171 N. W. 566], and the decision of this court in the case between this corporation's predecessor and the Treasurer of Puerto Rico, *West India Oil Co.* v. *Gallardo,* 6 F. (2d) 523.

The court (R. 45-46) quotes from the opinion in *American Steel & Wire Co.* v. *Speed, supra,* 192 U. S. 500, 518-522, where a New Jersey corporation manufacturing wire, nails, etc., in factories in various States, chose the city of Memphis, Tennessee, as its distribution point, to facilitate sales and deliveries of its products, and it appeared that upon ar-

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[8] That the commerce clause is not applicable to Puerto Rico, see: *Lugo* v. *Suazo,* 59 F. (2d) 386, 390, decided by this court on June 7, 1932.

riving at Memphis its products were deposited in the warehouse of a transportation company that delivered them to the persons to whom the New Jersey corporation sold them. Tennessee levied a tax on such products, and the corporation refused to pay it, claiming that the goods were in Tennessee only "in transit" to be delivered to its customers, and that the tax was in violation of the commerce clause. The Puerto Rico Supreme Court quotes (R. 46) the language of the United States Supreme Court upholding the validity of that tax, saying (192 U. S. at pp. 518-519; R. 46):

> "With these facts in hand we are of opinion that the court below was right in deciding that *the goods were not in transit,* but, *on the contrary, had reached their destination at Memphis,* and were *there held in store* at the risk of the Steel Company, *to be sold and delivered as contracts for that purpose were completely consummated.*" (*Italics supplied*)

5. The insular Supreme Court concludes (R. 48-49):

> "Applying the rules established in the cases we have cited to the facts in the present case, we must necessarily hold that when the importer took from the bonded tank a certain number of gallons of oil and delivered them to a ship at the dock in Puerto Rico, to consummate a sale already agreed upon, said sale was subject to the tax levied by Section 62 of the Internal Revenue Law, *supra;* that the oil thus sold, extracted and delivered by the importer lost its character as an import and came into Puerto Rico as an object of commerce and from that moment on was subject to the insular fiscal jurisdiction (*West India Oil Co.* v. *Gallardo,* 6 F. (2d) 523); that the fact that the oil has been delivered to a ship which is going to use it in its trips in interstate or international commerce does not make the oil an export, since said product was not consigned to any foreign or national port (*Swan & Finch Co.* vs. *United States, supra*); that the mere purchase of supplies or equipment which are to be used in a business in interstate commerce does not so confound said purchase with that business as to exempt it from the payment of the

tax levied by the insular law equally on all sales carried out or consummated within its jurisdiction (*Eastern Air Transport* v. *Tax. Comm.*, 285 U. S. 147); and finally that as the delivery of the oil was made at the wharf, in the San Juan harbor, the sale was consummated within the fiscal jurisdiction of Puerto Rico and was, therefore, subject to the payment of the 2 percent tax, which being a sales tax is in the nature of an excise tax and not a property tax. (*Gromer* v. *Standard Dredging Co.*, 224 U. S. 362).

"Since no violation of a Federal statute has been invoked which would give ships engaged in interstate commerce the privilege of buying, or oil corporations, of selling, within the limits of a state, objects of commerce, without having to pay the local excise taxes on sales carried out within the limits of the state, we must hold that the West India Oil Company is legally bound to pay the sum claimed by the appellant Treasurer. To decide otherwise would be to make the act discriminatory against the other merchants engaged in the same business."

APPELLEE'S POSITION

This appellee, the Treasurer of Puerto Rico, believes that the tax is validly imposed under Section 62 of the Internal Revenue Law of Puerto Rico, and that the judgment of the insular Supreme Court upholding it should be affirmed, substantially on the same grounds stated in the opinion of that court; and also, particularly, in so far as that opinion decides that, under the laws of Puerto Rico, the sales in question were to be considered as sales made in Puerto Rico, and not as made in New York, on the further ground that that decision is an interpretation and application by the local Territorial Supreme Court of the local Territorial statutes relating to sales, primarily of certain sections of the local Civil Code of Puerto Rico directly derived from the Spanish Civil Code, and of applicable civil law doctrines and commentaries, and is therefore peculiarly within the reason of the established rule that an interpretation

of local Territorial statutes by the local Territorial Supreme Court should not be disturbed unless "clearly erroneous"; and that the ruling of the local Supreme Court in the present case is certainly not "clearly erroneous", but, to the contrary, is wholly reasonable and clearly right in itself.

STATUTES

Applicable constitutional and statutory provisions, federal and Puerto Rican, are in Appendix II, *infra,* pp. 39-42.

SUMMARY OF ARGUMENT

The argument is summarized in the Subject-Index at the beginning of this brief. As above indicated (*ante,* p. 22) it runs, in general, along the lines of the opinion of the insular Supreme Court, and in addition it relies upon the established rule of the respect to be accorded to a decision of a local Territorial Supreme Court interpreting and applying local statutes, particularly when, as here, those statutes are not derived from common law sources, but from Spanish civil law sources. [See particularly *Diaz v. Gonzalez,* 261 U. S. 102, 105-106]

ARGUMENT

POINT I

This tax on sales is an excise tax; not a tax on property.

A. It is not a property tax; not a tax levied on any property; although its amount is measured by the value of the property sold. *It is,* however, *a true excise tax* levied on the privilege of conducting the business activities of the taxpayer,—in the present case, business activities of this domestic corporation of Puerto Rico, organized there under the local corporation laws.

B. It rests upon the authority given the Legislature by the Congress, by Section 3 of the Organic Act (*infra,* p. 39)

to lay "internal revenue" taxes, coupled with the provision in Section 9 of the Organic Act (Appendix II, *infra*, p. 40) that the federal "internal revenue laws" do not run to Puerto Rico.

C. It is of the same category as the similar excise tax levied on the privilege of carrying on the business activity of manufacturing sugar in the island [Par. 14, Sec. 20, "Excise Tax Law of Porto Rico", as amended August 27, 1923, Laws of 1923, Spec. Sess., Act No. 1, pp. 2, 4], which assessed "a manufacturing charge of four (4) cents on each hundred-weight of sugar manufactured or produced",—likewise a charge or tax *on the business activity,* although measured in that instance by the amount of the sugar produced, as it is here by the amount of business done, the amount of the sales. This court, in sustaining the sugar manufacturing charge, expressly called attention to the fact that it is *an excise tax* on the business activity of producing sugar, and not at all a property tax on the sugar itself; and, consequently, held it payable by a manufacturer carrying on that activity, and measured by the entire amount of sugar he produced, *despite the fact that* some of the sugar may have been exported and thereby expressly *exempted from property taxes* on the sugar itself; and that such exportation of the sugar and consequent exemption of the sugar itself from the property tax did not at all operate to reduce or to change the measure of the excise tax laid on the business activity of producing it; and, *hence* that the *excise tax must be* paid as *measured by the full amount of the sugar manufactured,* regardless of any *property tax exemption* as to the exported sugar. This court there said (*Loiza Sugar Co.* v. *People of Porto Rico,* 57 F. (2d) 705, 706, March 22, 1932):

> "[4] The tax authorized by paragraph 14 of section 20 as amended is clearly an excise tax on the manufacture of sugar, and in terms imposed on the factory or manufacturer. As originally enacted, though it was

undoubtedly intended as an excise tax, it was literally imposed on the article manufactured, produced, or consumed. In effect, however, it was an excise tax on the manufacture of sugar. *Patton* v. *Brady*, 184 U. S. 608, 618, 22 S. Ct. 493, 46 L. Ed. 713; *Porto Rican Tax Appeals* (C. C. A.) 16 F. (2d) 545, 549; *Sanchez Morales & Co., Inc.* v. *Gallardo* (C. C. A.) 18 F. (2d) 550; *Berman* v. *Gallardo* (C. C.A.) 18 F. (2d) 581; *Goodyear Tire & Rubber Co.* v. *Gallardo*, (C. C. A.) 18 F. (2d) 926.

"Section 43 of the Act provides: 'That articles subject to taxation in accordance with the provisions of this Act shall be exempt from taxation when exported from Porto Rico, after such regulations have been complied with, entries made and such bond furnished as the Treasurer of Porto Rico may prescribe.

"Lest paragraph 14 of section 20, as originally enacted, should be construed to impose a tax on sugar as property, and by reason of the exemption on exported articles under section 43 of the act, no, or little, revenue would be derived therefrom, we think the Legislature at the special session, by the amendment to paragraph 14, undertook to make it clear that it was not the intent to impose a tax on sugar as a distinct article or item, but an excise on its manufacture."

Certiorari was denied by the United States Supreme Court. *Loiza Sugar Co.* v. *Porto Rico*, 287 U. S. 632.

In the *Loiza Sugar* case, *supra*, this court further noted (57 F. (2d) 705, at p. 706), with relation to its decision that, as above quoted,

> "it was not the intent" [of the Legislature] "to impose a tax on sugar as a distinct article or item, but an excise tax on its manufacture",

that such was likewise the doctrine of the insular Supreme Court, that (*ib.*, p. 706)

> "The Supreme Court of Puerto Rico has so construed the law in People of *Porto Rico* v. *Central Los Caños, supra*" [35 P. R. Rep. 27, 30-32].

D. Such is likewise the holding of the insular Supreme Court in the present case with regard to *the business activity* here taxed under Section 62 of the local Puerto Rican Internal Revenue Law, which levies the tax "on the sale", —a tax which the insular Supreme Court expressly calls (R. 49) in the concluding part of its opinion, as above quoted (*ante*, p. 22):

> "a sales tax is in the nature of an excise tax and not a property tax. (*Gromer* v. *Standard Dredging Co.*, 224 U. S. 362)".

E. It necessarily follows that this sales tax, being not at all a tax on the oil as property, but, instead, a tax on this corporation's privilege of conducting the *business activity* of selling,—it is really wholly immaterial to its validity, or in measuring its amount: (a) what the *situs* of the property sold was at the time of the sale; (b) whether [as this court expressly held in the *Loiza Sugar* case as above quoted; *ante*, pp. 24-25] the property sold, or some portion of it, was to be exported, or was actually exported, either afterwards, or immediately; or (c) whether the property or some part of it was in transit in interstate commerce, or in foreign commerce, at the time of the sale, or whether it had already come to rest in Puerto Rico and become mingled with the mass of the property in that Territory.[9]

None of those things have anything to do with the Legislature's power to levy this excise impost on this *business activity* of making sales, carried on by this creature of the Legislature itself,—this domestic corporation chartered under the laws of Puerto Rico, and dwelling there.

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[9] As the insular Supreme Court correctly holds that it actually had, and was no longer "in transit" in foreign commerce (R. 44-49; *ante*, pp. 19-22).

POINT II

The power of the Legislature extends to levying an excise tax on the business activities of a domestic corporation of Puerto Rico, regardless of whether or not the subject of those activities is property located within the Territorial limits of Puerto Rico.

Plaintiff's deposit of the oil in a bonded warehouse is, therefore, immaterial here, for any purpose.

The excise is levied upon the exercise of the privilege granted the company by the Insular Government, by its charter, of carrying on this business.

A. In this respect this excise tax on sales made by the company,—on its exercise of the privilege granted by its charter of carrying on this business activity, measured by a percentage of the total business done,—is analogous to a corporation tax or a franchise tax measured by the total amount of the corporation's assets or the total amount of its business transactions, which the chartering State has the power to impose on its domestic corporations, and to assess in accordance with the amount of the corporation's total assets, or total business done, including assets and business transactions located or done in other States, outside of the territorial jurisdiction of the chartering State. *Newark Fire Insurance Co.* v. *State Board of Tax Appeals of New Jersey,* 307 U. S. 313, 318, 322, 323-324; *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 328, *et seq.*

B. Hence the only question to be considered here, with reference to the place where the sales were made, is not a question of the power of the Legislature, but is only a question of whether these particular sales fall within the limitation which the Legislature itself has voluntarily placed upon the imposition of the tax, by the limiting provision in Section 62 of the statute, providing for the imposition of the tax only

> "on the sale * * *, and at the time of *sale in Porto Rico*" (*Appendix II, infra,* p. 42),

which manifestly requires that the "sale" must have been made within the territorial limits of Puerto Rico.

C. Of course it is manifest,—and our opponents do not question,—that the definition of the word "sale" [SPANISH, *"al tiempo de verificarse la venta en Puerto Rico"; ante,* p. 15], as thus used by the local Legislature of Puerto Rico in relation to these local taxes [and particularly in applying it, as here, in relation to a local domestic corporation of Puerto Rico], is the definition of "sale" recognized by the local law.

D. It follows that the crucial question is whether or not, *under the local laws of Puerto Rico,* the sales of the oil here in question are to be considered as "sales" made "in Puerto Rico", or as sales made elsewhere. The local Territorial Supreme Court, interpreting the local laws, has held that they were made in Puerto Rico.

E. "In Porto Rico", as used in this local statute of the Legislature, manifestly means *within the territorial jurisdiction* within which, under the Organic Act [Secs. 25, 37] the Legislature has been granted, as the delegate of the Congress, "all local legislative powers". The scope of that territorial jurisdiction is defined by the Congress by the first section of the Organic Act (*Appendix II, infra,* p. 39) to extend to

> "the Island of Porto Rico and to the adjacent islands belonging to the United States, and waters of those islands."

And by Sections 7 and 8 of the Organic Act (*Appendix II, infra,* p. 40) the jurisdiction of the insular Legislature is likewise extended over [among other things]:

"all the harbor shores, docks, slips, reclaimed land,

> • • • not heretofore reserved by the United States for public purposes[9]" (Sec. 7) • • •,

and over

> "the harbor areas and navigable streams and bodies of water and submerged land underlying the same in and around the Island of Porto Rico and the adjacent islands and waters, now owned by the United States and not reserved by the United States for public purposes[9]" (Sec. 8) • •.

F. The designation by the customs authorities, at the request of the private owner of a warehouse, of such warehouse [primarily for the convenience of the private owner in carrying on his business] as a "bonded warehouse", under the federal tariff laws ["Tariff Act of 1930" as amended, Act of June 30, 1930, c. 497, Title IV, Sec. 555, 46 Stat. 590, 743; 19 U. S. Code, Par. 1555], plainly does not at all amount to a reservation of such warehouse "by the United States for public purposes" within the meaning of Sections 7 and 8 of the Organic Act, *supra,* in any such sense as to withdraw the warehouse from the local territorial jurisdiction granted to the insular Legislature and to the insular Government by Section 1 of the Organic Act, or to withdraw the warehouse from the operation of the insular laws. It does not place it within the category of "military reservations" conveyed to the United States, with the express consent of the State legislature in each instance [or, in Puerto Rico, upon an express "legislative grant" by the Legislature; Organic Act, Sec. 7, *supra; Appendix II, infra,* p. 40], over which the federal Government exercises "exclusive jurisdiction". Nothing of that kind is here involved. The decision of the insular Supreme Court on this point was clearly right. [Opinion, R. 35-39; *ante,* pp. 10-13].

With regard to such a "bonded warehouse", instituted

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[9] No such federal reservation is here involved in any way.

as such at the request of a private owner, the Attorney General of the United Statese ruled, years ago, under the federal statutes then in effect, substantially the same, in this respect, as the present statute [Rev. Stats. Secs. 2958, 2959, and 2960, of which the present Section 555 of the Tariff Act of 1930, *supra,* is the lineal descendant, through Section 555 of Title IV of the Act of September 21, 1922, c. 356, 42 Stat. 858, 976],—and the ruling appears to have stood unquestioned administratively ever since,—that, as it is digested in the notes to this section in the annotated edition of the United States Code [19 U. S. C. A. Par. 1555, foot-note "3", p. 1060]:

> "The private rights of the warehouseman and those having relations with him as such are in no wise affected by this joint custody, providing the rights of the government in and about the collection of its customs are not interfered with." [(1898) 22 Ops. Atty. Gen. 152].

G. It follows that, —in so far as concerns the meaning of the place limitation used by the Legislature in Section 62, *supra,* limiting the Treasurer, in his computation for the purpose of measuring the amount of the excise tax to be levied on this corporate activity, to counting only sales "in Porto Rico",—that a sale, even if made within such a bonded warehouse, could still be counted as a sale made within the territorial legislative jurisdiction of Puerto Rico, and so "in Porto Rico", within the meaning of the Legislature in this statute.

H. But the point is really immaterial here. It does not appear that any of these sales were really made within the bonded warehouse.

POINT III

The sales were made "in Porto Rico", within the meaning of Section 62 of the local excise law here involved.

A. The ruling of the insular Supreme Court to this effect [R. 39-43; *ante,* pp. 11, 12, 14-18] was clearly right.

B. Manifestly, as above pointed out (*ante*, Point II—C, p. 28], *the question* of whether the sales are to be considered as having taken place in Puerto Rico, or, as the appellant contends [*Brief*, "Point II", pp. 27-30] in New York, *is to be decided in accordance with the local law of Puerto Rico.* The Legislature in enacting this Section 62 of this local statute must be deemed to have intended to use this word "sale"[10] in the sense, and with the meaning attributed to it by the local laws.

C. The insular Supreme Court holds, that under the local law of Puerto Rico, in accordance with the applicable sections of the local Civil Code [Civil Code of Puerto Rico, Edition of 1930, Secs. 1339, 549, derived from the Spanish Civil Code], and with the comments of recognized authoritative commentators on the Spanish code [*Manresa, Scaevola*], and with earlier decisions of the Supreme Court of Puerto Rico itself, the "sales" of the oil here involved did not take place, or become completed, until their "consummation" by taking the oil from the tank, measuring it, and delivering it to the ships,—all of which was done in Puerto Rico; and that, accordingly, these sales are to be considered, under the local law of Puerto Rico, as made in Puerto Rico, and not in New York.

D. This ruling of the insular Supreme Court is likewise in accordance with decisions in various States of the Union, as the insular Supreme Court points out in its opinion (R. 41-42; and decisions there cited).

E. It is also in accordance with authorities cited by the appellant itself in its brief here (*Appellant's Brief*, pp. 19-22).

One of the recognized essentials, in order that the transaction may become a ripened "sale",—as contradistin-

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[10] Spanish edition, "al tiempo de verificarse la venta"; Laws of 1927, at pp. 473-475; *ante*, p. 15.

guished from an executory contract to sell,—is that the *goods sold shall have been so definitely identified, marked, or separated from the mass,* that they can be recognized, definitely, at once, as having become the property of the vendee;—for example, so definitely segregated and identified that they can be made the subject of a writ of replevin, or be claimed by the vendee as his property as against creditors of the vendor.

This established rule is recognized in authorities quoted in appellant's brief.

Thus, for example, in appellant's quotation (*Brief,* p. 19) from Corpus Juris (55 C. J., Sec. 534, p. 535) it is said:

> "Where there is an unconditional contract for the sale of **specific goods** * * *." (*Emphasis supplied*)

And again, in appellant's quotation (*Brief,* p. 19) from the Minnesota court's opinion in *Welck* v. *Lahart,* 122 Minn. 432, 436, the language is:

> "Presumptions. In the case of a sale of **specific goods,** that is, **goods that are specified** at the time the contract is made, the presumption is * * *". (*Emphasis supplied*)

And again in appellant's quotation (*Brief,* pp. 19-20) from *Iron City Grain Co.* v. *Arnold,* 215 Ala. 543, 544, the wording is:

> "Where the goods sold are in the possession of the seller, and **are definitely ascertained** and agreed upon—**nothing remaining to be done to determine** their **price, quantity** or **identity** * * *". (*Emphasis supplied*)

In other words, the goods must be so identified, in order to make a completed "sale", that, as said above, the vendee, in case of necessity, could sue out a writ of replevin and could put his finger on the particular goods, and say to the sheriff: "This is my property", without anything further having to be done in order to mark or identify *the particular goods* as those sold.

F. Nothing of the kind took place here. There is neither allegation nor proof that it did; no attempt whatever, in New York, to identify any particular oil as the oil sold; no sale of any particular cargo of any particular ship; no sale of any particular drums or containers marked or identified in any way. No segregation whatever was attempted in making the contracts in New York. The plaintiff West India Oil Company brought the oil in bulk from Aruba, indiscriminately, and put it all together in the same tank, and drew from the tank indiscriminately, for local consumption in Puerto Rico, for export to foreign countries, or for delivery to ships for the latter's own use under these contracts made in New York. There was no kind of identification in New York of any particular oil that any particular steamship company purchaser was to get under its contract; and no kind of identification at all, until one of its ships turned up at San Juan and asked for so much oil, which was then drawn from the mass in the tank, measured, and pumped into the ship. Until the moment that it actually flowed out of the tank, that particular oil was no more allocated to that particular steamship company purchaser than was any other part of the mass of the oil in the tank. If another ship had turned up first, belonging to another line holding one of these New York contracts, then the oil would have gone to that ship; and if that ship's demands, and local demands on the oil, had emptied the tank, then the other ship, when it came along, would have had no possible right to claim that that particular oil belonged to it, or to replevin it from the ship or the local purchaser that had actually got possession of it.

The contracts in New York appear, in effect, to have been just like what the wheat brokers call a "sale" of fifty thousand bushels of wheat in the Chicago wheat pit; not at all an actual sale of any particular wheat that the purchaser can identify as his and take away, but only a right to have that much wheat delivered to him out of the mass in a grain ele-

vator,—*provided* that much grain is there when the purchaser calls for it, and has not first been delivered to somebody else. That is not a completed sale of any particular article. It is a contract, a breach of which gives rise to an action for damages.

G. The essential element of the vendor's consent to these sales was likewise given in Puerto Rico, and not in New York.

This plaintiff company is a Puerto Rico corporation, having its principal office in San Juan. That is its domicile. "There it must dwell". *Newark Fire Ins. Co.* v. *State Board of Tax Appeals of New Jersey, supra,* 307 U. S. 313, 318; May 29, 1939. There its offices and officers are; and there its board of directors meets. It claims no office elsewhere, no "commercial domicile" in New York or anywhere else outside of Puerto Rico at which a part of its business may be said to have become "localized", such as, for example, the Wheeling Steel Corporation of Delaware had established in West Virginia. [*Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 211-215.] This appellant is a corporation of Puerto Rico, pure and simple. Its corporate acts are performed there. There, and there alone, its board meets and acts. There, and there alone, can it give its consent to a sale, or to any other contract.

I. Its purpose, for which it is chartered, and the business in which it engages, as alleged in its bill of complaint (Par. 1; R. 1-2), is "importing, purchasing and selling oil". IT IS NOT AN "AGENCY" COMPANY. It buys and sells oil on its own account. There is no suggestion in this record that it has any charter power to act as agent for others, or that it does so.[11]

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[11] There is no basis whatever in the record for appellant's suggestion (*Brief,* p. 22) that in this case, the "person making the sale" within the meaning of Section 62 of this Puerto Rican statute, "was the Standard Oil Co. of New

J. Since this appellant corporation, acting at its domicile in Puerto Rico, authorized the contracts to be made in New York on its behalf by its agent there, the Standard Oil Com-

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Jersey at its office in New York City" or that appellant

> "but acted as a mere agent of the seller to effect delivery of the thing sold."

Whatever this appellant company's relations with the Standard Oil Company may be, they are not shown in this record. But **there is no suggestion whatever, in the record, that the oil belonged in any way to the Standard Oil Company, or that this appellant West India Company was the Standard Oil Company's agent. Nothing of that kind.** The allegations (Par. 1, R. 1-2; Par. 4, R. 2-3) and the proof (Lee; R. 24), are just the other way around; that this West India Company is in business for itself, and that the contracts of sale are made for it by *the Standard Oil Company* in New York, the latter company *apparently acting as the agent of the West India Company.* Mr. Lee testified (R. 29) with relation to the former "West India Oil Company", that *such former company was an agent of the "West India Oil Company of New Jersey".* But there is no evidence anywhere,—as there is no allegation,—either that this present appellant company, or the former company, was ever an agent of the Standard Oil; nor is there anything whatever indicating this present appellant company's relations with the Standard Oil. There is just this bare statement by Mr. Lee (R. 24):

> "Q. 15. Please explain to the court the procedure used in making those sales and deliveries? A. The contract is signed in New York between the steamship company and the Standard Oil Company of New York; we receive in Puerto Rico notice of said contracts and we deliver the oil to any steamer belonging to the company which entered into such contract."

The necessary conclusion is that indicated in the opinion of the insular Supreme Court (R. 33, 35, 40; *ante*, pp. 2, 4, 5), that it was the Standard Oil Company that was acting in New York as the agent of this appellant,—the Standard negotiating there, on behalf of this appellant, with the steamship companies, for the sale of this appellant's oil in Puerto Rico.

pany, for the sale of its oil, it is evident that the original motivation of the contracts, the acts that set them in motion, the directions or the consent to them on behalf of the selling party,—the vendor's part in the "meeting of the minds",—was in each case the action of this appellant Puerto Rico corporation, at its "principal office" in San Juan, either by its board of directors or by its executive officers—[appellant has not seen fit to tell us how],—initiating the sale [or else ratifying it] by giving appropriate directions to its agent, the Standard Oil Company in New York.

The agent carried out the directions, contracts were made in New York with steamship companies, in accordance with this appellant West India Company's directions, and the ships, from time to time, came to San Juan and asked for so much oil, which was then measured out (and thus, for the first time, identified), and delivered to them.

K. *All of the essential steps of the sale* were *thus taken in San Juan*: The initial consent or direction for it; the measuring out and identifying the oil when the particular ships came to the port; and the actual delivery there in the port of San Juan. [And, also, although it is immaterial here, the proceeds must ultimately, necessarily, have come back to this appellant West India Company at its "principal office" in San Juan, even if the collections were made on its behalf by its agent, the Standard Oil Company, in New York.]

There can be no question of the correctness of the holding of the insular Supreme Court that these were "sales" in Puerto Rico; not in New York.

POINT IV

The established rule of the respect to be accorded to the decision of a local Territorial Supreme Court, interpreting local Territorial statutes and laws, is peculiarly applicable here.

A. As above pointed out (*ante*, pp. 16-17, 18-19) the insular Supreme Court's determination that these were sales in Puerto Rico, rather than in New York, is based directly upon the insular court's interpretation of sections of its local Civil Code, derived from the Spanish code, and of the text of authoritative commentators on the Spanish code,—that is to say, upon civil law sources, rather than on English common law sources.

B. Under these circumstances what was said by MR. JUSTICE HOLMES in delivering the opinion of the court in *Diaz* v. *Gonzales*, *supra*, 261 U. S. 102, 105-106, is directly applicable here:

> "The court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. It is enough to cite *De Villanueva* v. *Villanueva*, 239 U. S. 293, 299. *Nadal* v. *May*, 233 U. S. 447, 454. This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books. * * *. Our appellate jurisdiction is not given for the purpose of remodelling the Spanish American law according to common law conceptions except so far as that law has to bend to the expressed will of the United States. The importance that we attribute to these considerations led to our granting the writ of certiorari and requires us to reverse the judgment below."

C. The rule as to the respect to be paid to the decisions of the local Supreme Court interpreting local statutes and laws was recently strongly reaffirmed by the United States

Supreme Court with relation to decisions of the Supreme Court of Puerto Rico and Puerto Rican tribunals generally. The Court said, in *Sancho Bonet, Treasurer of Puerto Rico* vs. *Yabucoa Sugar Company,* 306 U. S. 505, 509-510:

> "And this Court has declared its unwillingness to overrule Puerto Rican tribunals upon matters of purely local concern or to decide against the local understanding of a local matter, not believed by this Court to be clearly wrong; and a disposition to accept the construction placed by a local court upon a local statute, and to sustain such a construction in the absence of clear or manifest error.
>
> "* * *. Orderly development of the government of Puerto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the Island." [*And see also the cases there cited* (*foot-notes,* pp. 509-510].

POINT V

Appellant's other contentions are sufficiently answered in the opinion of the insular Supreme Court (R. 44-49; *ante,* pp. 18-19, with comments in our footnotes).

The rulings of the insular Supreme Court on those points were plainly correct, for the reasons stated in its opinion, upon which we here rely.

CONCLUSION

The judgment of the insular Supreme Court was correct and should be affirmed.

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APPENDIX II

CONSTITUTION:

Article IV, Section 3, Clause 2:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

FEDERAL:

The Organic Act for Puerto Rico, Act of March 2, 1917, c. 145, 39 Stat. 951:

[Sec. 1] That the provisions of this Act shall apply to the Island of Porto Rico and to the adjacent islands belonging to the United States, and waters of those islands; • • •.

Sec. 2. That no law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the law. • • •

That the rule of taxation in Puerto Rico shall be uniform.

Sec. 3.—(*As amended by Act of Congress, approved March 4, 1927.*)—That no export duties shall be levied or collected on exports from Porto Rico, but taxes and assessments on property, income taxes, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Porto Rico; • • •

And it is further provided, That the internal-revenue taxes levied by the Legislature of Porto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island; *Provided,* That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico. The officials of the Customs and Post Services of the United States are hereby directed to assist the appropriate officials of the Porto Rican government in the collection of these taxes.

Sec. 7. That all property which may have been acquired in Porto Rico by the United States under the cession of Spain in the treaty of peace * * *, all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor works boards of Porto Rico, all the harbor shores, docks, slips, reclaimed lands, and all public lands and buildings not heretofore reserved by the United States for public purposes, is hereby placed under the control of the Government of Porto Rico, to be administered for the benefit of the people of Porto Rico; and the Legislature of Porto Rico shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable: *Provided,* That the President may from time to time, in his discretion, convey to the people of Porto Rico such lands, * * * *. And he may from time to time accept by legislative grant from Porto Rico any lands, buildings, or other interests or property which may be needed for public purposes by the United States.

Sec. 8. That the harbor areas and navigable streams and bodies of water and submerged land underlying the same in and around the Island of Porto Rico and the adjacent islands and waters, now owned by the United States and not reserved by the United States for public purposes be, and the same are hereby, placed under the control of the Government of Porto Rico, to be administered in the same manner and subject to same limitations as the property enumerated in the preceding section: * * *.

Sec. 9. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws: * * *.

Sec. 25. That all local legislative powers in Porto Rico, except as herein otherwise provided, shall be vested in a Legislature * * * designated "the Legislature of Porto Rico".

Sec. 37. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, * * *.

Tariff Act of 1930, Act of June 17, 1930, c. 497, 46 Stat. 590, 743, Secs. 555, 556, Title IV, p. 743; 19 U. S. Code, Pars. 1555 and 1556:

Sec. 555. Bonded Warehouses.

Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this Act, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse.

Sec. 556. Same—Regulations for Establishing.

The Secretary of the Treasury shall from time to

time establish such rules and regulations as may be necessary for the establishment of bonded warehouses and to protect the interests of the Government in the conduct, management, and operation of such warehouses and in the withdrawal of and accounting for merchandise deposited therein.

PUERTO RICO:

Internal Revenue Law of Puerto Rico, as amended by Act No. 17 of June 3, 1927; Laws of 1927, Special Session, pp. 458-486.

Sec. 62. There shall be levied and collected, once only, on the sale of any article the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, and at the time of sale in Porto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale. (pp. 472-474).

Sec. 16 (*a*). There shall be levied and collected, once only, on all articles included in section 62 of this Act, a tax of two (2) *per centum ad valorem,* as provided in section 4 hereof, when said articles are manufactured, produced or introduced in Porto Rico for domestic use or consumption; but payment shall be made before said articles are withdrawn from the factory or from the custody of the post office or customs authorities, or from the express or steamship agencies, in such manner as the Treasurer of Porto Rico may by regulation prescribe (p. 484).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 26

WEST INDIA OIL COMPANY (PUERTO RICO),
Petitioner,

vs.

MANUEL V. DOMENECH, TREASURER OF PUERTO RICO
(SUBSTITUTED FOR RAFAEL SANCHO BONET,
FORMER TREASURER),
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS,
FIRST CIRCUIT

BRIEF FOR RESPONDENT

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Of Counsel.

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BRIEF FOR RESPONDENT

OPINIONS OF THE COURTS BELOW

The opinion of the insular District Court of San Juan ("Statement of Facts, Opinion and Judgment", R. 15-22) is not officially reported. The opinion of the Supreme Court of Puerto Rico, reversing the District Court and upholding the tax in question (R. 33-49), is reported in 54 P. R. Dec. 732 [Spanish edition, Advance Sheets, July 1, 1939]. It has not yet appeared in the English edition of the Puerto Rico Reports. The opinion of the Circuit Court of Appeals (R. 55-59), affirming that of the insular Supreme Court, is reported in 108 F. (2d) 144.

JURISDICTION

Jurisdiction appears to exist in this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

QUESTION PRESENTED

The question is whether Puerto Rico may validly levy against a domestic corporation of the Island, organized under its insular corporation laws, its excise tax,[1] on account of sales of oil made in Puerto Rico by the local corporation, The West India Oil Company (P.R.), to American steamship companies for use in the propulsion of their ships plying between Puerto Rico and mainland ports, and consummated by pumping the oil at San Juan into the steamships out of "bonded tanks" where the company had been holding it in storage [indiscriminately for sale and delivery either in foreign commerce or for local consumption in the Island, or for consumption, as in the present case, by American flag vessels in their voyages between the Island and the mainland]. It appears that the company had brought the oil from Aruba, Dutch West Indies, to Puerto Rico, where it had stored it in warehouses owned by the company, but which had been bonded by the Federal government at the company's request*; and that any particular oil sold for any particular purpose from time to time, as for example, for local consumption or, as here, for the pro-

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[1] Section 62 of the Internal Revenue Act of Puerto Rico as amended by Act. No. 17 of June 3, 1937; Appendix, *infra*, p. 58.

> "on the sale of any articles the object of commerce, * * * and at the time of the sale in Puerto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale",

*"Class 2". "Importers' private bonded warehouses used exclusively for the storage of merchandise belonging or consigned to the proprietor thereof." (United States Customs Regulations, 1931, Art. 921; *ibid*, 1937, Art. 919.)

pulsion of ships to the mainland, was not segregated from the mass in the tanks, until it was pumped out at the company's request under the supervision of the Federal officials.

The Federal customs duties are remitted on oil sold for the propulsion of ships between the Island and the mainland.[2]

The insular District Court of San Juan thought the insular excise tax could not validly be levied on the company's act of selling the oil under these circumstances. The Supreme Court of Puerto Rico, however, took a different view. It reversed the District Court, and sustained the tax. The Circuit Court of Appeals agreed with the insular Supreme Court, and likewise sustained the tax. Certiorari was granted on the company's petition urging substantially the same contentions as in the lower courts. Respondent believes that the insular Supreme Court and the Circuit Court of Appeals were right; that the tax was validly levied against this domestic corporation of the Island as an excise tax on this business activity of selling the oil within Puerto Rico; and that the judgment of the Circuit Court of Appeals should be affirmed.

RESPONDENT'S POSITION

This case does not deal with foreign commerce, nor with sales of oil to ships for their propulsion in foreign commerce or to foreign countries. It is not within the doctrine of *McGoldrick* vs. *Gulf Oil Corporation,* 309 U. S. 414, decided March 25, 1940; but, on the contrary, in view of Congress' consent to this taxation, by the "Butler Act" of 1927, is rather within the reasoning of *McGoldrick* vs. *Berwind-White Coal Mining Co.,* 309 U. S. 33, decided[3] in connection with *Newark Fire Insurance*

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[2] Sec. 309, Tariff Act of 1930, c. 497, 46 Stat. 590, 690-691.

[3] Since it deals only with sales for propulsion of ships in interstate commerce between the Island and the main-

Co. vs. *State Board of Tax Appeals of New Jersey,* 307 U. S. 313, 318, 322, 323-324, and *Cream of Wheat Co.* vs. *Grand Forks,* 253 U. S. 325, 328, *et seq.*,[4] *Gromer* vs. *Standard Dredging Co.,* 224 U. S. 362, and *Loiza Sugar Co.* vs. *People of Puerto Rico,* 57 F. (2d) 705, 706 [C.C.A.-I], certiorari denied, *ibid.,* *Loiza Sugar Co.* vs. *Puerto Rico,* 287 U. S. 632;[5] *People of Puerto Rico* vs. *Shell Co.,* 302 U. S. 253, and *People of Puerto Rico* vs. *Rubert Her-*

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land; and not at all with foreign commerce; and the sale in Puerto Rico and delivery to the American ships for consumption in domestic commerce between the Island and the mainland removed the oil from the stream of foreign commerce, and mingled it with the mass of the company's property held for sale in the Island; and the imposition of the excise tax on the company's activity in making the sale results in no practical disadvantage whatever in the carrying on of interstate commerce between the Island and the mainland; but, on the contrary, the exemption of this local company from paying the excise tax on making sales of fuel oil of *foreign manufacture,* it had brought in from Aruba and was holding for sale in the Island, would work a plain discrimination against companies bringing oil to the Island from the mainland for such sales [as for example, from Texas], and would place the dealers in Texas oil or other mainland oils at a distinct disadvantage in competing for this interstate trade; and would moreover violate the requirement of the Congress in the Organic Act for Puerto Rico [Sec. 2, *infra,* Appendix, p. 51] "That the rule of taxation in Puerto Rico shall be uniform".

[4] The power of the Legislature extends to levying an **excise tax on the business activity** of a domestic corporation of Puerto Rico, regardless of where the subject of those activities is located; so that it is immaterial whether the oil deposited in the bonded warehouse is to be regarded as *pro tanto* withdrawn from the territorial jurisdiction.

[5] That this tax on the domestic company's act of making the sale is an *excise tax upon this business activity* of this local domestic corporation.

manos, Inc., 309 U. S. 543, decided March 25, 1940;[6] *Swan & Finch Company* vs. *United States*, 190 U. S. 143, 145;[7] and *American Steel & Wire Co.* vs. *Speed*, 192 U. S. 500, 518-522.[8]

STATEMENT

Petitioner's "Statement" (*Brief*, pp. 9-12) and also its statement of the "Questions Presented" (*Brief*, pp. 2-3) are somewhat inaccurate. Petitioner omits **essential facts;** viz. that:

A.—*The sales were made in Puerto Rico* [and not in New York, or elsewhere] as was correctly held by the Supreme Court of Puerto Rico, in construing, as a matter of *local law*, the requirement in this local taxing statute [Section 62 of the local Internal Revenue Act

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[6] That the Legislature of Puerto Rico, as the delegate of the Congress, possesses all local legislative powers [including the taxing power], except as expressly limited by act of Congress; and that it is no objection to the exercise of such local legislative powers that the Congress may itself have legislated in the same field.

[7] That fuel oil delivered to ships for use in their propulsion between the Territory of Puerto Rico and the mainland was not an "export", nor used in foreign commerce; but that, as the Court of Appeals correctly said in the present case (R. 58-59; 108 F. (2d) 144, 147):

> "But the fuel oil was not destined for a foreign port. As stated in *Swan & Finch Company* vs. *United States*, 190 U. S. 143, 'whatever primary meaning may be indicated by its derivation, the word "export" as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country.' We do not regard the oil put aboard for consumption at sea as 'exports' within the meaning of Section 3 of the Organic Act of Puerto Rico."

[8] Property held in storage awaiting sale becomes a part of the common mass of property in the State [Territory].

of Puerto Rico, *supra*]; and affirmed by the Circuit Court of Appeals [*infra*, p. 8].

B.—*The sales were made wholly for propulsion of ships in domestic commerce,* in voyages between the Territory of Puerto Rico and the mainland; and not at all for any foreign voyages, or for foreign commerce in any respect.[9]

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[9] It is true that the "stipulation" prior to the trial (R. 14) spoke of delivery of the oil.

> "to ships plying between Puerto Rico and ports of the United States and between Puerto Rico and foreign ports";

but upon the trial the only witness called was the petitioner-company's own witness, its assistant manager, Mr. Charles H. Lee, Jr. (R. 23-31), and Mr. Lee testified that the oil in question was all delivered for use in the propulsion of ships in *voyages between the Island and the United States mainland.* His testimony is, on direct examination (R. 24):

> "Q. 9. Does the West India and its predecessor in Puerto Rico have a bonded tank for fuel oil? A. Yes, sir.
>
> "Q. 10. When was that tank bonded? A. In December, 1932.
>
> "Q. 11. What is the exact date? A. December 3.
>
> "Q. 12. What was that tank bonded for? A. To store fuel oil, which is used largely by the steamers plying between Puerto Rico and the States".

And again on cross-examination (R. 28):

> "X-Q. 50. Where was the oil delivered? A. It was delivered from the tanks in our plant to the bunkers of the steamers.
>
> "X-Q. 51. Where are those tanks located? A. In Puerta de Tierra.
>
> "X-Q. 52. Here in San Juan? A. Yes, sir.
>
> "X-Q. 53. And the delivery of the 46 million gallons to which the complaint refers, was made in San Juan, Puerto Rico? A. Yes, sir.
>
> **"X-Q. 54. And the fuel oil delivered to those ships, was used by them in their trips between ports of Puerto Rico and the United States? A. Yes, sir.**

STATEMENT BY THE CIRCUIT COURT OF APPEALS

The facts are stated as follows in the opinion of the Circuit Court of Appeals (R. 56; 108 F. (2d) 144, 146):

"The appellant, West India Oil Company (P.R.) is a corporation chartered under the laws of Puerto Rico. Having obtained a United States license, it maintained two bonded tanks for receiving and depositing fuel oil brought from foreign countries. When so deposited in a bonded tank the oil is within the joint custody of United States Government Customs officials and the proprietor and can be withdrawn only with the consent of the Customs officials. *Tit. 19 U. S. C. Sec. 1555.* It remains in the tank until it is either exported, delivered to steamers for use for their engines as fuel, or delivered to purchasers for use in Puerto Rico. In the last case, it is entered through customs and the duty paid. In and before August, 1935, the Appellant withdrew and delivered about 46,000,000 gallons of fuel oil from the bonded tanks and delivered it to steamers which had purchased it for use in their voyages to the Continent and to foreign countries.[9-a]

"When oil was to be sold in this way, contracts for its sale were signed in New York by the Standard Oil Company of New York and the purchasing steamers or their owners. The appellant did not put in evidence any such contracts and except for the suggestion that the appellant is one of the New York Company's subsidiaries, all that we know is that the

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"X-Q. 55. This oil was not to be used during trips to other countries? A. No, sir.

X-Q. 56. And the oil was not brought from Aruba in transit to other countries? A. No, sir.

"X-Q. 57. Does this mean that the 46 million gallons of oil were drawn from the tanks that the company has in that manner . . . ? A. Yes.

"X-Q. 58. But the oil was not given away gratis? A. No. sir.

"X-Q. 59. Then, how was it delivered? A. The oil was sold."

[9-a] But none to foreign countries, in the present case. *Confer* Foot-note 9, *ante*, pp. 6-7.

Standard Oil Company of New York notified the appellant of the signing of the contracts, which in turn delivered the oil to the steamers requesting it. When such a delivery is to be made the customs office is notified and the delivery supervised by its officials. In such cases, no duties are exacted by the United States. The oil is thus delivered to the steamers. Bills therefor are presented and paid in New York".

OPINION OF THE CIRCUIT COURT OF APPEALS

As above stated, the Circuit Court of Appeals affirmed the judgment of the Territorial Supreme Court, which had upheld the tax. It is believed that the Circuit Court of Appeals was right, for the reasons stated in its opinion (R. 55-59, *supra*; 108 F. (2d) 144). Moreover its decision affirming the decision of the insular Supreme Court construing the phrase *"at the time of the sale in Puerto Rico"* contained *in the local insular statute* [Section 62 of the insular Internal Revenue Law; Appendix, *infra*, p. 58], and holding *that within the meaning of that insular statute the sales involved in the present case were made in Puerto Rico* (and not in New York, or elsewhere), should not be disturbed unless clearly wrong, in accordance with the established rule of the respect to be accorded to decisions of the local Territorial Supreme Court construing local Territorial statutes, *Sancho Bonet, Treasurer* v. *Yabucoa Sugar Co.*, 306 U. S. 505; *Sancho Bonet, Treasurer* v. *Texas Company*, 308 U. S. 463.

OPINION OF THE SUPREME COURT OF PUERTO RICO

The insular Supreme Court's opinion, by MR. JUSTICE TRAVIESO, states the case as follows ("Opinion", *supra*, R. 33-35; *Italics are those of the court itself*):

"This suit was filed under the provisions of Act No. 47 of April 25, 1931, to obtain a declaratory judgment in regard to the rights of the litigants.

"The plaintiff, the West India Oil Company (P. R.), is a domestic corporation engaged in importing, purchasing and selling oil and products derived

from the same. In connection with said business and to facilitate the sale and delivery of said products to purchasers, the plaintiff set up and maintained a bonded tank in the City of San Juan, Puerto Rico, in keeping with the Federal statutes (46 Stat. 743; 19 U. S. C. A., sec. 1555); said tank was used to receive and deposit fuel oil brought from foreign countries to Puerto Rico. The oil thus deposited remains in the tank for an undetermined period of time until it is (a) re-exported to a foreign country; or (b) delivered to the steamers that purchase it to be used as fuel for their engines; or (c) delivered to purchasers for use in Puerto Rico. While it remains in the bonded tank, the oil is under the control of the Customs Service of the Federal Government.

"From December 1932, through August 1935, the plaintiff corporation drew about 46,000,000 gallons of fuel oil from said bonded tank and delivered them to the steamers which had purchased it for use in their trips to the Continent[10] and to foreign countries.

"The Treasurer of Puerto Rico maintains that the oil thus delivered to said steamers in Puerto Rico is subject to a tax of 2 percent *ad valorem*, which in the present case amounts to $26,500, more or less. To impose said tax the Treasurer relies on the provisions of Section 62 of the Internal Revenue Act of Puerto Rico, as it was amended by Act No. 17 of June 3, 1927, which reads as follows:

> 'Section 62. There shall be levied and collected, once only, on the sale of any articles the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, *and at the time of sale in Porto Rico*, a tax of two (2) percent on the price or value of the daily sales of such articles, *whether such sales are for cash or credit*, which tax shall be paid at the end of each month

[10] *Id est*, the United States mainland. And see Footnote 9, *ante*, pp. 6-7.

by the person making such sale.' (Italics supplied.)

"The plaintiff corporation maintains that Section 62, *supra,* is not applicable to the oil taken out of the tank and delivered to the steamers, for the following reasons:

"1st. Because said oil never enters into Puerto Rico nor does it become property within the territory, since said tank is somewhat in the nature of a *tax-free zone,* not subject to the control of the Insular Government, but under the exclusive control of the Federal Government, said oil never being subject to the tax laws of Puerto Rico.

"2nd. Because the tax imposed would be an export [11] tax, prohibited by Section 3 of the Organic Act of Puerto Rico.

"3rd. Because said tax is a direct burden on interstate and foreign commerce and as such is not included in the powers of the Insular Legislature.

"4th. Because the fuel oil was still in foreign commerce when it was delivered to the steamers for use on the high seas.

"The District Court of San Juan decided that said oil had never acquired a taxable *situs* in Puerto Rico and therefore rendered judgment in favor of plaintiff. The defendant appealed. He alleges that the District Court has erred specifically in upholding each of the four reasons set forth by the plaintiff corporation against the imposition of the tax; and has committed a fifth error, in awarding costs to plaintiff.

"To complete the above findings of fact we should state that according to the testimony of Mr. Lee, assistant manager of the plaintiff corporation, the contracts for the sale of oil are signed in New York by the steamship company and the Standard Oil Company of New York; the latter notifies the plaintiff corporation that said contracts have been signed and the oil is delivered by said corporation to any ship of the purchaser steamship line that requests it. Mr.

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[11] Erroneously printed "import" in the transcript of the record here (R. 34).

Lee also testified that when a delivery of oil is to be made, the plaintiff notifies the customs office, which inspects the valves of the tank to see that the seals have not been broken and supervises the delivery, and notes the amount delivered; that the bills and payments are made in New York; that when the oil comes from Aruba the amount to be used locally is nowhere stated, nor the amount that is to be delivered to the ships, nor the amount that is to be reexported, but that it all comes together and is thus deposited in the tanks; that the tanks are situated in the Ward Puerto de Tierra, of San Juan; that when delivery of the oil is made to the ships *the contract of sale is entered into New York, but the oil is delivered in San Juan.*"

Further on in its opinion the insular Supreme Court found (R. 40):

> "**The complainant corporation has not considered it necessary to show us copies of the contracts entered into in New York between it and the steamship companies.** In fact, it has not even referred to said contracts in its amended petition. The fact of the existence of said contracts was first brought forth in the testimony of Mr. Lee,[12] to which we have referred. And if we accept said testimony in its entirety, the only thing that we can get out of it is that they were simply contracts entered into and signed in New York for the sale of a certain amount of fuel oil situated in Puerto Rico,[13] which was to be taken from the tanks of the corporation, measured and delivered at the dock in Puerto Rico to the ships of the purchasers when these should request it." (*Emphasis supplied*)

BASES OF INSULAR SUPREME COURT'S OPINION

The bases of the insular Supreme Court's opinion (R. 35-49) may be summarized as follows:

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[12] Mr. Lee's testimony in question and answer form; R. 23-31.

[13] May have been simply contracts for the steamship companies' "requirements" over a period of time.

1. The lower court (the insular District Court of San Juan) was in error in considering the bonded tank belonging to this private corporation as "a tax-free zone or a Federal Zone and as such as beyond the control or jurisdiction of the Insular Government, merely because employees of the Federal Government supervise and inspect the deposit and withdrawal of the fuel oil". Such a privately owned tank, although it has been designated as a "bonded warehouse" under Section 555 of the United States Tariff Act of 1930 [Appendix, *infra*, pp. 53-54] is *not* United States Government land subject exclusively to federal jurisdiction, as is a military reservation or other reservation to which the Federal Government has acquired title *with the consent of the State legislature* so as to vest exclusive jurisdiction in the federal Government under the Constitution [Art. I, Sec. 8, Cl. 17]. No such question arises here.[14]

After examining [R. 36-38] decisions relating to federal jurisdiction over military and other federal reservations, and as to other federally owned property]*Surplus Trading Co.* v. *Cook*, 281 U. S. 647; *Commonwealth* v. *Clary*, 8 Mass. 72; *Mitchell* v. *Tibbetts*, 17 Pick. 298; *United States* v. *Cornell*, 2 Mason 60, Fed. Cas. No. 14,867; *State ex rel. Jones* v. *Mack*, 62 Am. St. Rep. 811; *Ft. Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525; *United States* v. *Unzeuta*, 281 U. S. 138; *Standard Oil Co.* v. *California*, 291 U. S. 242; *People* v. *Suarez*, 51 P. R. Rep. .... (51 P. R. Dec. 903, Spanish edition, not yet published in English)], the insular Supreme Court concludes (R. 38-39):

> "After a thorough study of the above cited cases we feel bound to declare untenable the contention

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[14] Petitioner really admits this, in its brief in this court. It makes no attempt, in this court, to defend the opinion of the District Court in this respect. All that part of petitioner's contentions in the insular courts appears now to be abandoned in this court.

> that a bonded tank belonging to and constructed on private property in Puerto Rico of a corporation, is a tax-free zone or Federal property, over which the Insular Legislature has no jurisdiction whatsoever, for the only reason that employees of the Customs Service control and inspect the movement of the fuel oil deposited in said tank to facilitate the business of the corporation." [15]

2. The court then points out (R. 39) that the question for decision is *not* whether the insular Legislature has power to impose a tax on fuel oil while deposited in bond in the tanks of the West India Oil Co.; that there is no allegation in the plaintiff's complaint of the Treasurer having ever tried to impose any such tax; but that the question for decision is simply (R. 39):

> "Is the Treasurer of Puerto Rico legally authorized to impose and collect the 2 percent tax provided for by Section 62, *supra*" [Sec. 62, Internal Revenue Law of Puerto Rico], "on the price of the fuel oil that the plaintiff corporation bound itself to sell by a contract entered into in New York, which oil was to be delivered" [and actually was delivered] "at the dock in Puerto Rico by pumping it from the tanks to the ships of the purchaser corporations?"

And that the question depends for its solution on the interpretation of the phrase used in that section of the statute [*Appendix, infra,* p. 58], "at the time of sale in Puerto Rico". [Spanish: *"al tiempo de verificarse la venta en Puerto Rico"*; Laws of 1927, at pp. 473-475].

3. The court says (R. 39) further:

> "We accept as an indisputable premise that the fuel oil is an article of commerce the sale of which if it is consummated in Puerto Rico is subject to the payment of the tax. And if the other premise, that is that the sale of the oil was consummated in Puerto Rico, is established, we would be forced to the in-

[15] *Confer* 22 Ops. Atty. Gen. [U. S.] 152 [1898].

evitable conclusion that the Treasurer was correct in applying the statute to it."

The court then (R. 39-40) states the plaintiff corporation's contention that:

> "as the contract of sale was entered into, the bills made and the oil paid for in New York, the sale must be considered *consummated* in New York and not in Puerto Rico; and that the fact that at the moment when the sale was carried out the oil was in Puerto Rico, where delivery was made to the purchaser, does not authorize the Treasurer to impose the 2 percent tax on said sale."

And, after stating the Treasurer's contrary contention that, for the purposes of this tax, *"a sale is consummated where the delivery of the thing sold is made"*, and after commenting on the fact that *this plaintiff corporation "has not considered it necessary to show us copies of the contracts between it and the steamship companies"* and *"In fact, it has not even referred to said contracts in its amended petition"* [R. 40, quoted, *ante*, p. 11], and, after pointing out that, as above quoted (*ante*, p. 11) even the fact of the existence of those contracts was first brought out in the testimony of Mr. Lee, the court proceeds (R. 40-41):

> "And if we accept said testimony" [of Mr. Lee] "in its entirety, the only thing that we can get out of it is that they were simple contracts entered into and signed in New York for the sale of a certain amount of fuel oil situated in Puerto Rico, which was to be taken from the tanks of the corporation, measured and delivered at the dock in Puerto Rico to the ships of the purchasers when these should request it.
>
> "We have no doubts that the contracts between the oil corporation and the steamship companies were perfected from the moment they were signed in New York, the contracting parties having agreed as to the thing object of the contract and as to the purchase price, without requiring the previous delivery of one

or the other. Section 1339 of the Civil Code, 1930 ed. The agreement in regard to the object and the purchase price is sufficient to constitute a valid contract of sale binding as between the purchaser and the vendor, the former having an action to demand the delivery of the thing sold to him and the latter to claim the payment of the price agreed upon.

"However, we are not trying to determine the rights and obligations as between the purchaser and the vendor, but the obligation that a vendor who consummates" [Spanish: *"verifica"*; 54 P. R. Dec., at p. 742; Advance Sheets, July 1, 1939] "a sale of an object of commerce within the limit of a state enters into with a third party, the state.

"Manresa, in his Commentaries to the Spanish Civil Code, in dealing with *the perfection* and *the consummation* of a contract of sale says as follows:

> 'From the moment of agreement, and without any other requisite, the contract, we repeat, is perfected and the obligations of the parties arise; but the transmission of the property does not exist until the thing has been delivered. The delivery of the thing refers to the consummation; the section which we are studying merely states the moment in which the contract is perfected . . . We said that the generally accepted rule sustains the doctrine of the transmission of the property merely by agreement and without the necessity of the previous delivery of possession, and that, *on the contrary, our* code still requires said requisite to consider the property transmitted.' [*Italics are the court's*] 10 Manresa, page 60, 2d ed.

"And the Commentator Scaevola says:

> 'All these considerations lead us to declare as a consequence *that the transmission of the title of the thing sold from the vendor to the purchaser takes effect at the time when the contract is consummated and not simply when it is perfected.*' [*Italics are the court's*] 23 Scaevola, 318.

"The same doctrine has been upheld by this court in *Olivari* v. *Bartolomei*, 2 Judgments of the Supreme

Court of Puerto Rico 79; *Capo[redacted] S. A. Panzardi & Co.*, 44 P. R. R. 225; and *Benitez Flores* v. *Llompart*, 50 P. R. R. . . . ." [50 P. R. Dec. (*Spanish Ed.*) 670] "See: Section 549 of the Civil Code, 1930 ed."

After citing (R. 41-42) decisions in a number of the States along the same lines as the Puerto Rico law, the Court adds (R. 42-43):

> "In the present case **the title or right of property** could not be transmitted to the purchaser **until the oil was taken from the tank, measured** and delivered to the ships.
>
> > **'But the acceptance of the delivery order will not transfer the property if something remains to be done, such as weighing or measuring, to identify the goods or ascertain the quality sold.'** 55 C. J. 562. See pages 530-542.
>
> "See: *Iron City Grain Co.* v. *Arnold*, 215 Ala. 543, 112 So. 123. *Lopez & Moran* v. *Sobrinos de Ezquiaga*, 34 P. R. R. 75.
>
> **"In accordance with the authorities cited we must arrive at the conclusion that the contract or promise of sale entered into in New York was not consummated until the oil was extracted from the tank, measured** and delivered to the ships in their tanks." (*Emphasis supplied*)

Quoting from definitions in the "Dictionary of the Spanish Language" the court (R. 43) overrules the plaintiff's contention that the provision in Section 62 of the statute that the tax is to be imposed and collected "at the time of sale in Puerto Rico" [al tiempo de *verificarse la venta* en Puerto Rico"; *cf.*, *ante*, p. 13] means "when the contract was entered into or perfected", rather than when the sale is consummated by delivery. The court holds that the language of the statute refers to the "carrying out or accomplishment of an act", and concludes its discussion of this part of the case by saying (R. 43):

"We are, therefore, of the opinion, and we so decide, that in providing in Section 62, *supra,* that the 2 percent tax shall be imposed and collected 'at the time of sale ["*de verificarse la venta*"] in Puerto Rico' and that said tax shall be paid 'by the person *making* such sale', the legislator had the intent to and meant to impose the tax at the place of and at the moment when the sale was consummated by the delivery to the purchaser of the thing sold, without taking the manner of paying the purchase price into consideration, since the tax is made applicable to all sales whether 'for cash or on credit'. To sustain the opposite would be to make the evasion of the tax a simple matter, in New York as well as in Puerto Rico, since the courts of that state have held that the tax may not be levied when the thing object of the contract is delivered out of the city of New York even though the contract is entered into or signed in said city. *United Artists Corporation* v. *Taylor,* 7 N. E. (2d) 254, 273 N. Y. 334, affirming 248 App. Div. 207."

4. The court overrules [R. 44 ("2")] the plaintiff corporation's contention that the tax levied by the Treasurer on oil delivered to the ships for their own consumption,—[American flag ships plying between Puerto Rico and the United States mainland in the coastwise shipping trade between United States ports, San Juan and New York or Baltimore or others],—is an "export duty" prohibited by Section 3 of the Organic Act (Appendix, p. 51). The court, in holding that such delivery of oil to the ships, to be consumed in their own propulsion, is not an "export", within the meaning of Section 3 of the Organic Act, and in overruling plaintiff's contention that it is then "still in foreign commerce when it was delivered to the ships to be used on the high seas", points out that the ordinary meaning of the word "export" as used in the Constitution and laws of the United States is "the *transportation* of goods from this country *to a foreign country*", and quotes what this Court said in *Swan and Finch* v. *United States,* 190 U. S. 143, 145:

> "It cannot mean simply a carrying out of the country * * * . Nor would the mere fact that there was no purpose of return justify the use of the word 'export'. *Coal placed on a steamer in San Francisco to be consumed in propelling that steamer to San Diego* [16] *would never be so designated.* Another country or State as the intended destination of the goods is essential to the idea of exportation." (*Italics supplied*)

5. Replying to plaintiff's invocation of the "commerce clause" of the Constitution, and its contention that the levy of this tax on the oil delivered in Puerto Rico to the ships to be consumed in their own propulsion [between San Juan and other United States ports, mostly mainland ports] "constitutes a direct burden on interstate and foreign commerce" and therefore that the Legislature of Puerto Rico "has no authority to impose said tax", the court, without reference to the fact that the "commerce clause" is not applicable to Puerto Rico, which is not one of the States of the Union,[17] overrules plaintiff's contention (R. 44-46 ["3"], and holds that the imposition of this excise tax on this domestic corporation of Puerto Rico, upon its sales to these ships of oil for their own consumption, is *not* a direct burden on interstate or foreign commerce, within the decisions of this Court [*Kelly* v. *Rhoades,* 188 U. S. 1; *American Steel & Wire Co.* vs. *Speed,* 192 U. S. 500, 518-522; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Susquehanna Coal Co.* v. *South Amboy,* 228 U. S. 665; *Bacon* v. *Illinois,* 227 U. S. 504; *Brown*

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[16] [Oil pumped into a steamer in San Juan to be consumed in propelling that steamer to New York].

[17] That the commerce clause is not applicable to Puerto Rico, see: *Lugo* v. *Suazo,* 59 F. (2d) 386, 390, June 7, 1932; *Sancho Bonet, Treas.* vs. *Bacardi Corp.,* 109 F. (2d) 57, 62-63 [now pending here; No. 21 at the present term; a copy of "Point V" of that brief is Appendix II (*infra,* pp. 59-64) to this brief].

v. *Maryland,* 12 Wheat. 419; *May* v. *New Orleans,* 178 U. S. 496; *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362; and *Eastern Air Transport* vs. *South Carolina Tax Commission,* 285 U. S. 147, 150-153; together with the Minnesota decision in *State* v. *Maxwell Motor Sales Corp.,* [Minn.], 171 N. W. 566], and the decision of the Circuit Court of Appeals, First Circuit, in the case between this corporation's predecessor and the Treasurer of Puerto Rico, *West India Oil Co.* v. *Gallardo,* 6 F. (2d) 523].

The court (R. 45-46) quotes from the opinion in *American Steel & Wire Co.* v. *Speed, supra,* 192 U. S. 500, 518-522, where a New Jersey corporation manufacturing wire, nails, etc., in factories in various States, chose the city of Memphis, Tennessee, as its distribution point, to facilitate sales and deliveries of its products, and it appeared that upon arriving at Memphis its products were deposited in the warehouse of a transportation company that delivered them to the persons to whom the New Jersey corporation sold them. Tennessee levied a tax on such products, and the corporation refused to pay it, claiming that the goods were in Tennessee only "in transit" to be delivered to its customers, and that the tax was in violation of the commeree clause. The Puerto Rico Supreme Court quotes (R. 46) the opinion of this Court upholding the validity of that tax, that (192 U. S. at pp. 518-519; R 46):

> "With these facts in hand we are of opinion that the court below was right in deciding that *the goods were not in transit,* but, *on the contrary, had reached their destination at Memphis,* and were *there held in store* at the risk of the Steel Company, *to be sold and delivered as contracts for that purpose were completely consummated.*" (*Italics supplied*)

6. The insular Supreme Court concludes (R. 48-49):

> "Applying the rules established in the cases we have cited to the facts in the present case, we must necessarily hold that when the importer took from the bonded tank a certain number of gallons of oil

and delivered them to a ship at the dock in Puerto Rico, to consummate a sale already agreed upon, said sale was subject to the tax levied by Section 62 of the Internal Revenue Law, *supra;* that the oil thus sold, extracted and delivered by the importer lost its character as an import and came into Puerto Rico as an object of commerce and from that moment on was subject to the insular fiscal jurisdiction (*West India Oil Co.* v. *Gallardo,* 6 F. (2d) 523); that the fact that the oil has been delivered to a ship which is going to use it in its trips in interstate or international commerce does not make the oil an export, since said product was not consigned to any foreign or national port (*Swan & Finch Co.* vs. *United States, supra*); that the mere purchase of supplies or equipment which are to be used in a business in interstate commerce does not so confound said purchase with that business as to exempt it from the payment of the tax levied by the insular law equally on all sales carried out or consummated within its jurisdiction (*Eastern Air Transport* vs. *Tax Comm.,* 285 U. S. 147); and finally that as the delivery of the oil was made at the wharf, in the San Juan harbor, the sale was consummated within the fiscal jurisdiction of Puerto Rico and was, therefore, subject to the payment of the 2 percent tax, which being a sales tax is in the nature of an excise tax and not a property tax. (*Gromer* v. *Standard Dredging Co.,* 224 U. S. 362).

"Since no violation of a Federal statute has been invoked which would give ships engaged in interstate commerce the privilege of buying, or oil corporations, of selling, within the limits of a state, objects of commerce, without having to pay the local excise taxes on sales carried out within the limits of the state, we must hold that the West India Oil Company is legally bound to pay the sum claimed by the appellant Treasurer. To decide otherwise would be to make the act discriminatory against the other merchants engaged in the same business."

STATUTES

Applicable constitutional and statutory provisions, federal and Puerto Rican, are in the Appendix, *infra,* pp. 51-58.

SUMMARY OF ARGUMENT

The argument is summarized in the Subject-Index at the beginning of this brief. As above indicated (*ante*, p. 3-5) it runs, in general, along the lines of the opinions of the insular Supreme Court and of the Circuit Court of Appeals; and in addition it relies upon the established rule of the respect to be accorded to a decision of a local Territorial Supreme Court interpreting and applying local statutes, particularly when, as here, those statutes are not derived from common law sources, but from Spanish civil law sources. [See particularly *Diaz* v. *Gonzales*, 261 U. S. 102, 105-106]. And finally it points out that this case, not dealing with sales in foreign commerce, is not ruled by the recent decision of this court in *McGoldrick* vs. *Gulf Oil Corporation, supra*, 309 U. S. 414; but is rather analogous in essential points to *McGoldrick* vs. *Berwind-White Coal Mining Co., supra*, 309 U. S. 33.; and that the levy and collection of these insular sales taxes, upon the importer's *first sales* of this oil brought in from foreign countries, is *expressly authorized by the Congress*, by the "Butler Act" addition, March 4, 1927, of the *Proviso* to Section 3 of the Organic Act.

ARGUMENT

POINT I

This tax on sales is an excise tax. It is not a tax on property.

A. It is not a property tax; not a tax levied on any property; although its amount is measured by the value of the property sold. *It is*, however, *a true excise tax* levied on the privilege of conducting the business activities of the taxpayer,—in the present case, business activities of this domestic corporation of Puerto Rico, organized there under the local corporation laws.

B. It rests upon the authority given the Legislature by the Congress, by Sections 25 and 37 of the Organic Act to exercise "all local legislative powers," together with

that particularly given by Section 3 of the Act, with the *Proviso* added to it by the "Butler Act" of March 4, 1927, to lay *"internal revenue"* taxes and to levy and collect them "on the articles subject to said tax, *as soon as the same are* manufactured, sold, used, or *brought into the island"* [Appendix, *infra,* pp. 51-52, 53], coupled with the provision in Section 9 of the Organic Act (Appendix, *infra,* p. 53) that the federal "internal revenue laws" do not run to Puerto Rico.

C. It is of the same category as the similar excise tax levied on the privilege of carrying on the business activity of manufacturing sugar in the island [Par. 14, Sec. 20, "Excise Tax Law of Porto Rico", as amended August 27, 1923, Laws of 1923, Spec. Sess., Act No. 1, pp. 2, 4], which assessed "a manufacturing charge of four (4) cents on each hundred-weight of sugar manufactured or produced",—likewise a charge or tax *on the business activity,* although measured in that instance by the amount of the sugar produced, as it is here by the amount of business done, the amount of the sales. The Circuit Court of Appeals for the First Circuit, in sustaining the sugar manufacturing charge, expressly called attention to the fact that it is *an excise tax* on the business activity of producing sugar, and not at all a property tax on the sugar itself; and, consequently, held it payable by a manufacturer carrying on that activity, and measured by the entire amount of the sugar he produced, *despite the fact that* some of the sugar may have been exported and thereby expressly *exempted from property taxes* on the sugar itself; and that such exportation of the sugar and consequent exemption of the sugar itself from the property tax did not at all operate to reduce or to change the measure of the excise tax laid on the business activity of producing it; and, *hence* that the *excise tax must be* paid as *measured by the full amount of the sugar manufactured,* regardless of any *property tax exemption* as to the ex-

ported sugar. That court there said (*Loiza Sugar Co.* v. *People of Porto Rico,* 57 F. (2d) 705, 706, March 22, 1932):

> "[4] The tax authorized by paragraph 14 of section 20 as amended is clearly an excise tax on the manufacture of sugar, and in terms imposed on the factory or manufacturer. As originally enacted, though it was undoubtedly intended as an excise tax, it was literally imposed on the article manufactured, produced, or consumed. In effect, however, it was an excise tax on the manufacture of sugar. *Patton* v. *Brady,* 184 U. S. 608, 618, 22 S. Ct. 493, 46 L. Ed. 713; *Porto Rican Tax Appeals* (C. C. A.) 16 F. (2d) 545, 549; *Sanchez Morales & Co., Inc.,* v. *Gallardo* (C. C. A.) 18 F. (2d) 550; *Berman* v. *Gallardo* (C. C. A.) 18 F. (2d) 581; *Goodyear Tire & Rubber Co.* vs. *Gallardo* (C. C. A.) 18 F. (2d) 926.
>
> "Section 43 of the Act provides: 'That articles subject to taxation in accordance with the provisions of this Act shall be exempt from taxation when exported from Porto Rico, after such regulations have been complied with, entries made and such bond furnished as the Treasurer of Porto Rico may prescribe.
>
> "Lest paragraph 14 of section 20, as originally enacted, should be construed to impose a tax on sugar as property, and by reason of the exemption on exported articles under section 43 of the act, no, or little, revenue would be derived therefrom, we think the Legislature at the special session, by the amendment to paragraph 14, undertook to make it clear that it was not the intent to impose a tax on sugar as a distinct article or item, but an excise on its manufacture."

This court denied certiorari. *Loiza Sugar Co.* v. *Porto Rico,* 287 U. S. 632.

In the *Loiza Sugar* case, *supra,* the Circuit Court of Appeals further noted (57 F. (2d) 705, at p. 706), with relation to its decision that, as above quoted,

> "it was not the intent" [of the Legislature] "to impose a tax on sugar as a distinct article or item, but an excise tax on its manufacture",

that such was likewise the doctrine of the insular Supreme Court, that (*ib.*, p. 706)

> "The Supreme Court of Puerto Rico has so construed the law in People of *Porto Rico* v. *Central Los Canos, supra*" [35 P. R. Rep. 27, 30-32].

D. The decision is in harmony with that of this Court in *Indian Motorcycle Co.* vs. *United States*, 283 U. S. 570, 573-575, cited by the Circuit Court of Appeals (R. 570; 108 F. (2d), at p. 146), in which this court held the federal tax levied under Section 600 of the Revenue Act of 1924, c. 234, 43 Stat, 253, 332, "upon the following articles sold or leased by the manufacturer, producer, or importer," to be "*an excise, and not a direct tax on the articles named*" [at p. 573], and to be "*laid on the sale, and on that alone*" [at p. 573]. (*Italics supplied*)

E. Such is likewise the holding of the insular Supreme Court in the present case with regard to *the business activity* here taxed under Section 62 of the local Puerto Rican Internal Revenue Law, which levies the tax "on the sale",—with reference to which the insular Supreme Court expressly says (R. 49) in the concluding part of its opinion, as above quoted (*ante*, p. 20) that it,

> "**being a sales tax is in the nature of an excise tax** and not a property tax. (*Gromer* v. *Standard Dredging Co.*, 224 U. S. 362)".

F. It necessarily follows that this sales tax, being not at all a tax on the oil as property, but, instead, a tax on this corporation's privilege of conducting the *business activity* of selling,—*it is really wholly immaterial to its validity, or in measuring its amount*: (a) what the *situs* of the movable personal property sold was at the time of the sale; (b) whether [as was expressly held in the *Loiza Sugar* case as above quoted; *ante*, pp. 22-23] the property sold, or some portion of it, was to be exported, or was actually exported, either afterwards, or immediately; or (c) whether the property or some part of it

was in transit in interstate commerce, or in foreign commerce, at the time of the sale, or whether it had already come to rest in Puerto Rico and become mingled with the mass of the property in that Territory.[18]

None of those things has anything to do with the Legislature's power to levy this excise impost on this *business activity* of making sales, carried on by this creature of the Legislature itself,—this domestic corporation chartered under the laws of Puerto Rico, and dwelling there.

POINT II

The power of the Legislature extends to levying an excise tax on the business activities of a domestic corporation of Puerto Rico, regardless of whether the subject matter of those activities, if, as here, movable personal property, is then actually located within the jurisdictional Territorial limits of Puerto Rico, or not.

Plaintiff's deposit of the oil in a bonded warehouse is, therefore, immaterial here, for any purpose.

The excise is levied upon the exercise of the privilege granted the company by the Insular Government, by its charter, of carrying on this business.

A. In this respect this excise tax on sales made by the company,—on its exercise of the privilege granted by its charter of carrying on this business activity, measured by a percentage of the total business done,—is analogous to a corporation tax or a franchise tax measured by the total amount of the corporation's assets or the total amount of its business transactions, which the chartering State has the power to impose on its domestic corporations, and to assess in accordance with the amount of the corporation's total assets, or total business done, including assets and business transactions located or done in other States, outside of the territorial jurisdiction of the chartering State.

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[18]As the insular Supreme Court correctly holds that it actually had, and was no longer "in transit" in foreign commerce (R. 44-49; *ante*, pp. 18-20).

Newark Fire Insurance Co. vs. *State Board of Tax Appeals of New Jersey,* 307 U. S. 313, 318, 322, 323-324; *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 328, *et seq.*

B. Hence the only question to be considered here, with reference to the place where the sales were made, is not a question of the power of the Legislature, but is only a question of whether these particular sales fall within the limitation which the Legislature itself has voluntarily placed upon the imposition of the tax, by the limiting provision in Section 62 of the statute, providing for the imposition of the tax only

> "on the sale * * *, and at the time of *sale in Porto Rico*" (*Appendix, infra,* p. 58),

which manifestly requires that the "sale" must have been made within the Territorial limits of Puerto Rico.

C. Of course it is manifest,—and our opponents do not question,—that the definition of the word "sale" [SPANISH, *"al tiempo de verificarse la venta en Puerto Rico"; ante,* p. 13], as thus used by the local Legislature of Puerto Rico in relation to these local taxes [and particularly in applying it, as here, in relation to a local domestic corporation of Puerto Rico], is the definition of "sale" recognized by the local law.

D. It follows that the crucial question is whether or not, *under the local laws of Puerto Rico,* the sales of the oil here in question are to be considered as "sales" made "in Puerto Rico", or as sales made elsewhere. The local Territorial Supreme Court, interpreting the local laws, has held that they were made in Puerto Rico.

E. "In Porto Rico", as used in this local statute of the Legislature, manifestly means *within the Territorial jurisdiction* within which, under the Organic Act [Secs. 25, 37; Appendix, *infra,* p. 53] the Legislature has been granted, as the delegate of the Congress, "all local legis-

lative powers". The scope of that Territorial jurisdiction is defined by the Congress by the first section of the Organic Act (*Appendix, infra,* p. 51) to extend to

> "the Island of Porto Rico and to the adjacent islands belonging to the United States, and waters of those islands."

And by Sections 7 and 8 of the Organic Act (*Appendix, infra,* pp. 52-53) the jurisdiction of the insular Legislature is likewise extended over [among other things]:

> "all the harbor shores, docks, slips, reclaimed land, * * * not heretofore reserved by the United States for public purposes[19]" (Sec. 7) * * *,

and over

> "the harbor areas and navigable streams and bodies of water and submerged land underlying the same in and around the Island of Porto Rico and the adjacent islands and waters, now owned by the United States and not reserved by the United States for public purposes[19]" (Sec. 8) * * *.

F. The designation by the customs authorities, at the request of the private owner of a warehouse, of such warehouse [primarily for the convenience of the private owner in carrying on his business] as a "bonded warehouse", under the federal tariff law ["Tariff Act of 1930" as amended, Act of June 30, 1930, c. 497, Title IV, Sec. 555, 46 Stat. 590, 743; 19 U. S. Code, Par. 1555], plainly *does not at all amount* to a reservation of such warehouse "by the United States for public purposes" within the meaning of Sections 7 and 8 of the Organic Act, *supra,* in any such sense as to withdraw the warehouse from the local Territorial jurisdiction granted to the insular Legislature and to the insular Government by Section 1 of the Organic Act, or to withdraw the warehouse from the operation of the insular laws. It does not

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[19] No such federal reservation is here involved in any way.

place it within the category of "military reservations" conveyed to the United States, with the express consent of the State legislature in each instance [or, in Puerto Rico, upon an express "legislative grant" by the Legislature; Organic Act, Sec. 7, *supra*; *Appendix, infra,* p. 52], over which the federal Government exercises "exclusive jurisdiction". Nothing of that kind is here involved. The decision of the insular Supreme Court on this point was clearly right. [Opinion, R. 35-39; *ante,* pp. 12-13].

With regard to such a "bonded warehouse", instituted as such at the request of a private owner, the Attorney General of the United States ruled, years ago, under the federal statutes then in effect, substantially the same, in this respect, as the present statute [Rev. Stats. Secs. 2958, 2959, and 2960, of which the present Section 555 of the Tariff Act of 1930, *supra,* is the lineal descendant, through Section 555 of Title IV of the Act of September 21, 1922, c. 356, 42 Stat. 858, 976],—and the ruling appears to have stood unquestioned administratively ever since,—that, as, it is digested in the notes to this section in the annotated edition of the United States Code [19 U. S. C. A. Par. 1555, foot-note "3", p. 1060]:

> **"The private rights of the warehouseman and those having relations with him as such are in no wise affected by this joint custody, providing the rights of the government in and about the collection of its customs are not interfered with."** [(1898) 22 Ops. Atty. Gen. 152].

G. It follows that, —in so far as concerns the meaning of the place limitation used by the Legislature in Section 62, *supra,* limiting the Treasurer, in his computation for the purpose of measuring the amount of the excise tax to be levied on this corporate activity, to counting only sales "in Porto Rico",—that a sale, even if made within such a bonded warehouse,—[or of movable personal property then actually located there],—could still be counted as a sale made within the Territorial legislative jurisdiction

of Puerto Rico, and so "in Porto Rico", within the meaning of the Legislature in this statute.

H. But the point is really immaterial here. It does not appear that any of these sales were really made within the bonded warehouse. The sales were consummated,—"made", within the meaning of the local laws of Puerto Rico, as interpreted by the insular Supreme Court [R. 39-43; *ante,* pp. 13-17],—by the delivery of the oil to the ships, *after* it had been released from the bonded tanks. That is the business activity that is taxed.

POINT III

The sales were made "in Porto Rico", within the meaning of Section 62 of the local excise law here involved.

A. The ruling of the insular Supreme Court to this effect [R. 39-43; *ante,* pp. 13-17] was clearly right.

B. Manifestly, as above pointed out (*ante,* Point II—C, p. 26), *the question* of whether the sales are to be considered as having taken place in Puerto Rico, or, as the petitioner improperly assumes, without squarely meeting the question [Brief, pp. 38, *et aliunde*], in New York, *is to be decided in accordance with the local law of Puerto Rico.* The Legislature in enacting this Section 62 of this local statute must be deemed to have intended to use this word "sale" [20] in the sense, and with the meaning attributed to it by the local laws.

C. The insular Supreme Court holds that under the local laws of Puerto Rico, in accordance with the applicable sections of the local Civil Code [Civil Code of Puerto Rico, Edition of 1930, Secs. 1339, 549, derived from the Spanish Civil Code], and with the comments of recognized authoritative commentators on the Spanish code [*Man-*

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[20] Spanish edition, "al tiempo de verificarse la venta"; Laws of 1927, at pp. 473-475; *ante,* p. 13.

resa, Scaevola], and with earlier decisions of the Supreme Court of Puerto Rico itself, the "sales" of the oil here involved did not take place, or become completed, until their "consummation" by taking the oil from the tank, measuring it, and delivering it to the ships,—all of which was done in Puerto Rico; and that, accordingly, these sales are to be considered, under the local law of Puerto Rico, as sales made in Puerto Rico; and not in New York.

D. This ruling of the insular Supreme Court is likewise in accordance with decisions in various States of the Union, as the insular Supreme Court points out in its opinion (R. 41-42, *ante*, p. 16, and decisions there cited).

E. One of the recognized essentials, in order that the transaction may become a ripened "sale",—as contradistinguished from an executory contract to sell,—is that the *goods sold shall have been so definitely identified, marked, or separated from the mass,* that they can be recognized, definitely, at once, as having become the property of the vendee;—for example, so definitely segregated and identified that they can be made the subject of a writ of replevin, or be claimed by the vendee as his property as against creditors of the vendor.

In other words, the goods must be so identified, in order to make a completed "sale", that, as said above, the vendee, in case of necessity, could sue out a writ of replevin and could put his finger on the particular goods, and say to the sheriff: "This is my property", without anything further having to be done in order to mark or identify *the particular goods* as those sold.

F. Here, nothing of the kind took place, in New York. There is neither allegation nor proof that it did; no attempt whatever, in New York, to identify any particular oil as the oil sold; no sale of any particular cargo of any particular ship; no sale of any particular drums or containers marked or identified in any way. No

segregation whatever was attempted in making the contracts in New York. The plaintiff West India Oil Company brought the oil in bulk from Aruba, indiscriminately, and put it all together in the same tank, and drew from the tank indiscriminately, for local consumption in Puerto Rico, for export to foreign countries, or for delivery to ships for the latter's own use under these contracts made in New York. There was no kind of identification in New York of any particular oil that any particular steamship company purchaser was to get under its contract; and no kind of identification at all, until one of its ships turned up at San Juan and asked for so much oil, which was then drawn from the mass in the tank, measured, and pumped into the ship. Until the moment that it actually flowed out of the tank, that particular oil was no more allocated to that particular steamship company purchaser than was any other part of the mass of the oil in the tank. If another ship had turned up in the meantime, belonging to another line holding one of these New York contracts, then the oil would have gone to that ship; and if that ship's demands, and local demands on the oil, had emptied the tank, then the first ship, when it came along, would have had no possible right to claim that that particular oil belonged to it, or to replevin it from the ship or the local purchaser that had actually got possession of it.

There was not a completed sale in New York of any particular oil. There were executory contracts,—breaches of which might have given rise to actions for damages.

G. The essential element of the vendor's consent to these sales was likewise given in Puerto Rico, and not in New York.

This plaintiff company is a Puerto Rico corporation, having its principal office in San Juan. That is its domicile. "There it must dwell". *Newark Fire Ins. Co.* v. *State Board of Tax Appeals of New Jersey, supra,* 307 U. S. 313, 318. There its offices and officers are; and

there its board of directors meets. It claims no office elsewhere; no "commercial domicile" in New York or anywhere else outside of Puerto Rico at which a part of its business may be said to have become "localized", such as, for example, the Wheeling Steel Corporation of Delaware had established in West Virginia. [*Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 211-215.] This petitioner is a corporation of Puerto Rico, pure and simple. Its corporate acts are performed there. There, and there alone, its board meets and acts. There, and there alone, can it give its consent to a sale, or to any other contract.

H. Its purpose, for which it is chartered, and the business in which it engages, as alleged in its bill of complaint (Par. 1; R. 1-2), is "importing, purchasing and selling oil". IT IS NOT AN "AGENCY" COMPANY. It buys and sells oil on its own account. There is no suggestion in this record that it has any charter power to act as agent for others, or that it does so.[21]

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[21] Whatever this petitioner company's relations with the Standard Oil Company may be, they are not shown in this record. But **there is no suggestion whatever, in the record, that the oil belonged in any way to the Standard Oil Company, or that this petitioner West India Company was the Standard Oil Company's agent. Nothing of that kind.** The allegations [Par. 1, R. 1-2; Par. 4, R. 2-3) and the proof (Lee; R. 24), are just the other way around; that this West India Company is in business for itself, and that the contracts of sale are made for it by *the Standard Oil Company* in New York, the latter company *apparently acting as the agent of the West India Company.* Mr. Lee testified (R. 29) with relation to the former "West India Oil Company", that *such former company was an agent of the "West India Oil Company of New Jersey".* But there is no evidence anywhere,—as there is no allegation,—either that this present petitioner company, or the former company, was ever an agent of the Standard Oil; nor is there anything whatever indicating this present appellant company's

I. Since this petitioner corporation, acting at its domicile in Puerto Rico, authorized the contracts to be made in New York on its behalf by its agent there, the Standard Oil Company, for the sale of its oil, it is evident that the original motivation of the contracts, the acts that set them in motion, the directions or the consent to them on behalf of the selling party,—the vendor's part in the "meeting of the minds",—was in each case the action of this petitioner Puerto Rico corporation, at its "principal office" in San Juan, either by its board of directors or by its executive officers—[petitioner has not seen fit to tell us how],—initiating the sale [or else ratifying it] by giving appropriate directions to its agent, the Standard Oil Company in New York.

The agent carried out the directions, executory contracts were made in New York with steamship companies, in accordance with this petitioner West India Company's directions, and the ships, from time to time, came to San Juan and asked for so much oil, which was then measured out (and thus, for the first time, identified), and delivered to them.

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relations with the Standard Oil. There is just this bare statement by Mr. Lee (R. 24):

> "Q. 15. Please explain to the court the procedure used in making those sales and deliveries? A. The contract is signed in New York between the steamship company and the Standard Oil Company of New York; we receive in Puerto Rico notice of said contracts and we deliver the oil to any steamer belonging to the company which entered into such contract."

The necessary conclusion is that indicated in the opinion of the insular Supreme Court (R. 33, 35, 40; *ante*, p. 11), that it was the Standard Oil Company that was acting in New York as the agent of this petitioner,—the Standard negotiating there, on behalf of this petitioner, with the steamship companies, for the sale of this petitioner's oil in Puerto Rico.

K. *All of the essential steps of the sale* were *thus taken in San Juan*: The initial consent or direction for it; the measuring out and identifying the oil when the particular ships came to the port; and the actual delivery there in the port of San Juan. [And, also, although it is immaterial here, the proceeds must ultimately, necessarily, have come back to this petitioner West India Company at its "principal office" in San Juan, even if the collections were made on its behalf by its agent, the Standard Oil Company, in New York.]

There can be no question of the correctness of the holding of the insular Supreme Court that these were "sales" in Puerto Rico; not in New York.

POINT IV

The established rule of the respect to be accorded to the decision of a local Territorial Supreme Court, interpreting local Territorial statutes and laws, is peculiarly applicable here.

A. As above pointed out (*ante*, pp. 15-17) the insular Supreme Court's determination that these were sales in Puerto Rico, rather than in New York, is based directly upon the insular court's interpretation of sections of its local Civil Code, derived from the Spanish code, and of the text of authoritative commentators on the Spanish code,—that is to say, upon civil law sources, rather than on English common law sources.

B. Under these circumstances what was said by MR. JUSTICE HOLMES in delivering the opinion of this court in *Diaz* v. *Gonzales*, *supra*, 261 U. S. 102, 105-106, is directly applicable here:

> "The court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. It is enough to cite *De Villanueva* v. *Villanueva*, 239 U. S. 293, 299. *Nadal* v. *May*, 233 U. S. 447, 454. This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which

prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books. * * *. Our appellate jurisdiction is not given for the purpose of remodelling the Spanish American law according to common law conceptions except so far as that law has to bend to the expressed will of the United States. The importance that we attribute to these considerations led to our granting the writ of certiorari and requires us to reverse the judgment below."

C. The rule as to the respect to be paid to the decisions of the local Supreme Court interpreting local statutes and laws has recently been strongly reaffirmed by this Court with relation to decisions of the Supreme Court of Puerto Rico and Puerto Rican tribunals generally, in *Sancho Bonet, Treasurer of Puerto Rico* vs. *Yabucoa Sugar Company,* 306 U. S. 505, 509-510, and in *Sancho Bonet, Treasurer* vs. *Texas Company,* 308 U. S. 463, 470-472. In the *Yabucoa Sugar Company* case, this Court said (pp. 509-510):

"And this Court has declared its unwillingness to overrule Puerto Rican tribunals upon matters of purely local concern or to decide against the local understanding of a local matter, not believed by this Court to be clearly wrong; and a disposition to accept the construction placed by a local court upon a local statute, and to sustain such a construction in the absence of clear or manifest error.

"* * *. Orderly development of the government of Puerto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the

Island." [*And see also the cases there cited, footnotes,* pp. 509-510].

POINT V

The levy of this excise tax on the first sale in Puerto Rico of this oil is within the authority expressly granted by the Congress by the *Proviso* added to Section 3 of the Organic Act by the "Butler Act" amendment of March 4, 1927, authorizing the levy and collection of internal-revenue taxes by the Legislature of Puerto Rico, "on the articles subject to said tax, as soon as the same are * * * brought into the island", and directing the officials of the Customs and Postal Services of the United States "to assist the appropriate officials of the Porto Rican government in the collection of these taxes".

A. Petitioner brought the fuel oil here involved from Aruba[22] to Puerto Rico and "stored" it there, awaiting sale, in its own warehouse, which at its request had been "bonded" by the federal government (Complaint, R. 2), as

> "a bonded tank for receiving and depositing fuel brought from foreign countries, part of which is destined for re-shipment to foreign countries and for use by ships on the high seas in interstate and foreign commerce, and part of which is to be used and consumed in Puerto Rico".

That is to say, it was bonded as a "Class 2" warehouse under the United States customs regulations [Art. 921, Customs Regulations, 1931; Art. 919 of the 1937 Regulations]:

> "Class 2. Importers' private bonded warehouses used exclusively for the storage of merchandise belonging or consigned to the proprietor thereof."

From such a "Class 2" warehouse the proprietor

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[22] Already "processed" or manufactured from crude oil, there is a foreign country; and *not to be manufactured* or further processed *within the United States,* but only to be held in Puerto Rico for sale, and deposited there for "storage" for that purpose.

might at any time properly withdraw the goods in storage, or any part of them, at discretion, as the Complaint as above quoted alleges was the purpose here, either for re-shipment abroad in foreign commerce, or for sale [as with the oil here involved] in domestic commerce to American flag ships plying in the coastwise shipping trade between Puerto Rico and mainland ports of the United States, or for local use and consumption in Puerto Rico, just as might be desired from time to time,[23]—the customs duties being remitted under the provisions of the United States tariff laws if the oil were withdrawn for foreign shipment; remitted also [Section 309, Tariff Act of 1930, *supra*] if sold for consumption by American flag ships in domestic commerce with the mainland; or paid if sold for local use or consumption in Puerto Rico. *But in either case, the petitioner* owning the oil stored there, in Puerto Rico, in its own warehouse, thus bonded as a "Class 2" warehouse, *remained perfectly free to sell the oil for any purpose for which it saw fit;* whether to go back into foreign commerce, or to be used as ship's stores in domestic commerce, or to be used for local consumption. That was all in the petitioner's discretion. *The placing of the oil in this "Class 2" warehouse* thus *did not determine its destination in any way,* nor operate to keep it within the stream of foreign commerce. On the contrary, the oil having thus been "brought into the island" ["Butler Act" *Proviso* to Section 3 of the Organic Act, *supra*], and deposited there in this private importer's warehouse for "storage" awaiting the importer's unfettered disposition, it was no longer in the stream of foreign commerce; but had "come to rest" within the

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[23] Herein differing sharply from a "Class 6" warehouse, such as that involved in the *Gulf Oil Corporation* case (*McGoldrick* v. *Gulf Oil Corporation,* 309 U. S. 414, 422, 425-427), deposit in which necessarily ear-marked the oil exclusively for export in foreign commerce.

Island, and become a portion of the mass of the property in the Territory.

B. And this is true even though the import duties had not yet actually been paid. Their payment had been secured to the United States by the Importer's bonds, and could be remitted only in accordance with the laws of the United States. The goods had thus actually been "entered",[24] and accounted for in the books of the Customs House authorities. They were no longer on the high seas. They had actually been landed in the United States; and were no longer subject to the authority of any other country, but wholly subject to the sovereign authority of the United States, and to its laws.

C. They had, therefore, as above stated, "come to rest" and had "become a part of the mass of the property" in the Territory, subject to its taxing laws, within the meaning of the decisions of this court in *Woodruff* vs. *Parham,* 8 Wall. 123, and cases following it, such as *Sonneborn* vs. *Cureton,* 262 U. S. 506, 510-513; *Brown* vs. *Houston,* 114 U. S. 622; *American Steel & Wire Co.* vs. *Speed, supra,* 192 U. S. 500, 518-522; *Texas Co.* vs. *Brown,* 258 U. S. 466, 476-477; *McGoldrick* vs. *Berwind-White Co.,* 309 U. S. 33, 46 *et seq.*

POINT VI

That this oil was brought in from a foreign country, and that the sale in Puerto Rico here taxed was its first sale after landing, is immaterial. The Congress has given its "Consent" to the tax.

A. As above noted [*Point V, ante,* pp. 37-38] the Congress, by the March 4, 1927, "Butler Act" *Proviso* added to Section 3 of the Organic Act, expressly extended the general local legislative powers of its delegate, the Legislature of Puerto Rico, to the levy and collection of

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[24] Tariff Act of 1930, Secs. 484, 557; Customs Regulations, 1931, Arts. 278-287, 312; *ibid,* 1937, Arts. 283-292, 317.

such local internal-revenue taxes on articles so brought in from foreign countries "*as soon as the same are * * * brought into the island*".

B. In view of this express authority from the Congress, the Constitutional provision [Art. I, Sec. 10, Cl. 2] that:

> "No State shall, without the Consent of the Congress lay any imposts or duties on imports",

(except for the purposes of its inspection laws), is immaterial here.

If that provision is applicable to Puerto Rico at all,[25] then this "Butler Act" amendment of 1927 constitutes the deliberate and intended "Consent" by the Congress, within the meaning of that Constitutional provision, to the levy of this sales tax, under the local Puerto Rican laws, upon the first sale after the goods are landed in the Island, even though still remaining in the importer's hands, and even though still in the "original package".[26]

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[25] In view of its wording, "NO STATE SHALL" etc., and of the fact that Puerto Rico is not a State; but is a federal Territory governed under the direction of the Congress itself by virtue of its Constitutional power, Art. IV, Sec. 3, Cl. 2, "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"; *Confer, infra*, pp.40-41.

[26] As to this latter,—"original package" condition,—a substantial question might arise in this case, if it were material, in view of the fact that it may fairly be inferred on this record that this fuel oil did not actually remain, after landing, in the original drums in which it was imported; but, rather, was put into the general mass of the oil deposited in the importer's tanks there in the Island.

POINT VII

The legislative history of the "Butler Act" emphasizes the intention of the Congress.

A. January 7, 1927, the Circuit Court of Appeals, First Circuit, on rehearing in 43 sales tax injunction cases coming from the federal District Court of Puerto Rico, heard and decided together as the *"Porto Rico Tax Appeals"*, 16 F. (2d) 545, 548, sustained the Puerto Rican sales taxes levied on the first sales of goods arriving in the Island from the United States mainland, from States of the Union; but, in five of the cases [Nos. 1944, 1945, 1946, 1947, and 1949], where the goods had been brought into the Island from foreign countries, and the insular sales taxes levied on the first sales by the importers while the goods were still in the original packages, the Circuit Court of Appeals,—[rightly or wrongly],—held that the sales taxes could not be levied on the first sales in those cases, saying,—in answer to the argument that the prohibition of clause 2 of section 10 of Article I of the Constitution, *supra,* that **"No State** shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws", is directed only against the States of the Union, and does not affect the general local legislative powers granted by the Congress without limitation to the Legislature of Puerto Rico,—that (*ibid,* 69 F. (2d) at p. 549):

> "*Brown* vs. *Maryland* is applicable to importations from foreign countries sold by the importers in the original packages, and the taxes as to such importations so sold must be enjoined. But the invalidity of such taxes does not affect other taxes. Compare section 108 of the act. Sales of such goods, not by the importers in the original packages, are taxable. *Waring* vs. *The Mayor, 8 Wall.* 110, 19 L. Ed. 342. The right of Porto Rico to tax the sales of foreign importations is not greater than the corresponding right of a state."

B. Six of those forty-three cases of different classes, selected as test cases,—including two of the above cases involving goods brought to the Island from foreign countries, Nos. 1944 and 1949, the *Valdez* and the *Finley, Waymouth & Lee* cases,—were afterwards brought up to this court on certiorari [Nos. 1018 to 1020 and 1021 to 1024 at the October Term, 1926, numbering changed to Nos. 211 to 216 at the 1927 Term], and decided here October 24, 1927 (*Smallwood* vs. *Gallardo,* and five other cases, 275 U. S. 56), when this court ordered the entire proceedings in each case dismissed for want of jurisdiction under another section of the "Butler Act" adopted in the meantime, March 4, 1927, forbidding the maintenance in the United States District Court for Puerto Rico of suits to enjoin the collection of Puerto Rican taxes, this court saying (275 U. S., *supra,* at p. 62), "When the root is cut the branches fall."

C. But in the meantime *the Congress* stepped in, and by Section 1 of the "Butler Act," approved March 4, 1927, *—less than two months after the decision by the Circuit Court of Appeals above quoted,—expressly overrode that decision,* and gave direct Congressional consent to the levy of the insular sales taxes on articles brought from foreign countries,—technically "importations,"—equally as on goods brought in from States of the Union, by the express provision in the *Proviso* added to Section 3 of the Organic Act that the taxes might be levied (Act of March 4, 1927, *supra,* "Butler Act", c. 503, 44 Stat. 1418; *ante,* Point VI, pp. 38-39),

> "as soon as the same are manufactured, sold, used, or brought into the island: *Provided,* That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Porto Rican government

in the collection of these taxes." [*Emphasis supplied*]

POINT VIII

The commerce clause is not applicable here.

A. Likewise the commerce clause does not run to Puerto Rico, because it relates only to commerce "among the several States" of the Union. [This is elaborated somewhat in the brief for the Respondent in the case of *Bacardi Corporation* vs. *Domenech, Treasurer of Puerto Rico* (the present Respondent here), No. 21 at the present of this Court, in Point V of that Brief [pp. 31-37]. A copy of that Point V is in Appendix II to this Brief (*infra*, pp. 59-64).]

B. Even if it were otherwise applicable to the present case, the same provision of Section 1 of the "Butler Act" last above quoted expressly gives the consent, and the authority of the Congress, to the levy of these sales taxes *"as soon as"* the articles of which the sale is the subject *"have been brought into the island"*; whether from a foreign country, or from the mainland.

Whether this express provision of the Congress be looked at in the light of "Consent" to the local taxation, under Article I, Section 10, Clause 2 of the Constitution, relating to State imposts[27]; or as a "Regulation" by the Congress in the exercise of its power under the commerce clause; or as a further specific delegation of powers, under the Territorial clause, Article IV, Section 3, Clause 2 of the Constitution, to its delegate, the Legislature of Puerto Rico, in amplification or clarification of the general grant of "all local legislative powers" which it had already given under Sections 3, 25

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[27] Or tonnage dues (Clause 3, Sec. 10, Art. I, Constitution), if that clause, likewise directed wholly to the States, could possibly be said to have any bearing here, in any event. Petitioner's argument on that score (*Brief*, "Point V," p. 37), seems beside the mark.

and 37 in the Organic Act as originally enacted,—in either event the effect is the same.

The Congress, fully clothed with plenary power in the premises, whether acting under one or the other or all three of those Constitutional grants of power to it, directed that the Legislature of Puerto Rico might levy its local internal-revenue taxes on these sales, at its pleasure, as soon as the goods had been brought into the Island, regardless of the fact that these might be *first sales* of foreign goods imported into the Island.

C. And in connection with this it is to be remembered that the Congress by Section 9 of the Organic Act had likewise expressly provided that the general internal-revenue laws of the United States should not run to the Island. They have no effect there.

POINT IX

It is wholly immaterial here that the Congress by Section 309 of the Tariff Act of 1930 directed that federal tariff taxes and duties should be remitted upon oil imported from foreign countries and used for the propulsion of ships in domestic commerce between Puerto Rico [or other off-shore Territories or possessions] and the mainland. There is no repeal of the local taxing powers expressly granted the Legislature of Puerto Rico.

A. Petitioner contends that this remission of *tariff duties*[28] is, in itself, tantamount to an expression by the Congress of its will that no local taxes should be levied upon imported oil sold to ships for use in their propulsion between the Islands and the mainland; that the levy of local internal revenue taxes by the insular government would be in opposition to the policy of the Congress.

B. The contention is really a contention that this clause

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[28] Section 9 of the Organic Act (Appendix, *infra*, p. 53), provides that the federal internal revenue laws do not run to Puerto Rico, in any event.

of Section 309 of the Tariff Act of 1930 amounts to a *repeal by implication, pro tanto,* not only of the general grants of all local legislative powers and of the taxing powers which the Congress had given to the Legislature by Sections 25, 37, and 3 of the Organic Act, but also, in particular, of the grant of powers specifically given by the *proviso* added to Section 3, in 1927, by the "Butler Act" (*ante,* pp. 41-42) to levy and collect insular non-discriminatory internal-revenue taxes on imported articles, equally with those brought in from the States of the Union, *"as soon as the same are manufactured, sold, used, or brought into the island".*

C. But *federal tariff duties* are a different thing from local internal-revenue taxes. This court specifically held in relation to Puerto Rico in *Jordon* vs. *Roche,* 228 U. S. 436, 441, in 1913, that the discontinuance of the *tariff* duties on merchandise coming into the United States from Puerto Rico, by the Presidential proclamation July 25, 1901 [32 Stat. Pt. 2, p. 1983] under Section 3 of the former Organic Act for Puerto Rico, the Foraker Act of April 12, 1900 (c. 191, 31 Stat. 77) did not operate to discontinue or to affect in any way the internal-revenue tax upon articles of Puerto Rican manufacture, which continued to be in force and the proceeds to be turned into the Treasury of Puerto Rico. It is true that that internal-revenue tax was levied directly by the Congress, whereas the internal-revenue tax here involved is levied by the local Legislature as the delegate of the Congress; but under direct Congressional authority, so that the principle remains the same. The exemption from *tariff* duties of articles sold for this particular purpose does not in itself indicate any intention to exempt such articles from local insular taxes. If that had been the intention of the Congress, it would surely have so provided directly, with its direct plenary power over Puerto Rico; and not have left the exemption to be gath-

ered from uncertain implications. All that would have been necessary, had that actually been the Congressional intent, would have been to insert such a clause in Section 309 of the Tariff Act of 1930. It is not there.

D. **Repeals by implication are not favored.**

The established rule is applicable here. As this court said in *Cope* vs. *Cope,* 137 U. S. 682, 686:

> "Nothing is better settled than that repeals, and the same may be said of annulments, by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction."

Recently in *Posadas, Collector* vs. *National City Bank,* 296 U. S. 497, 503-505, this court again examined the rule, and restated it, quoting (at p. 504) from the opinion by Mr. Justice Woods in *Red Rock* vs. *Henry,* 106 U. S. 596, 601, as follows:

> "The result of the authorities cited is that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest."

Applying these principles it seems clear that the mere exemption from tariff duties, in Section 309 of the Federal Tariff Act of 1930, of oil or other articles sold for ships' stores for consumption in the domestic trade between the Island and the mainland, is very far from being sufficient to operate in itself as a repeal by implication of the taxing powers expressly granted to the Legislature of Puerto Rico by the 1927 *proviso* added to Section 3 of the Organic Act by the "Butler Act," or of the general taxing powers given by Sections 3, 25 and 37 of the Organic Act, or as any limitation upon them.

POINT X

This case is not governed by *McGoldrick* vs. *Gulf Oil Corporation*, 309 U. S. 414. The circumstances are very different.

A. In the *Gulf Oil Corporation* case, the oil was brought from Venezuela in crude form, and was deposited for *manufacture* into fuel oil in a bonded manufacturing warehouse,—"Class 6", "Warehouses for the manufacture in bond, solely for exportation", under the Customs Regulations [Art. 921, Regulations of 1931; Art. 919, Regulations of 1937] from which type of warehouse, "Class 6", the goods could be withdrawn only "for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Philippine Islands" (Customs Reg., 1931, Art. 960; *ibid*, 1937, Art. 980); so that, as this Court found, the Venezuelan oil so deposited for manufacture into fuel oil in bond in the *Gulf Oil Corporation* case was thereby *necessarily ear-marked solely for re-exportation in foreign commerce,* and was not available at all for sale for local consumption. As this Court there said (*McGoldrick* vs. *Gulf Oil Corp., supra,* 309 U. S. 414, 426):

> "It cannot lawfully be removed from the manufacturing warehouse except for delivery for use as fuel to a vessel engaged in foreign commerce and it cannot lawfully be diverted from such destination and use and cannot, after delivery to the vessel, be landed in the United States. Throughout, the oil is subject to the obligation of respondent's bonds that it shall remain under such supervision and control and shall not be diverted from its ultimate destination as ships' stores."

B. It remained therefore always strictly within the stream of foreign commerce. It was never at any time placed [*as was the oil in the present case*] in an open "storage" "Class 2" warehouse so as to be available for sale or withdrawal for local consumption or for the purposes of domestic commerce, but was always held strictly

for exportation, in the "Class 6" manufacturing warehouse, within the stream of foreign commerce.

C. *That is the radical distinction between the two cases.* In the present case the oil was deposited in the open "Class 2" warehouse, "Importers' Private Warehouse" under the Customs Regulations, where it was held available for sale, and awaiting sale, for any purpose whatever, and to any purchaser, whether for local consumption, or for domestic commerce, or for consumption by vessels in domestic commerce to the mainland, or for sale for consumption by foreign vessels in the foreign trade, or for re-exportation in foreign commerce,—for any purpose whatsoever.

Within the meaning of the consent given by the Congress, by the "Butler Act" of 1927, *ante,* to the levy of insular internal revenue taxes, *it had been "brought into the island,* and had "come to rest" there; become a part of the mass of the property in the Territory; so as to be subject to the local taxing powers, within the rule of *Woodruff* vs. *Parham* and *American Steel & Wire Co.* vs. *Speed,* and the other cases in that category [*ante,* Point V, pp. 36-38].

D. In the *Gulf Oil Corporation* case this court found (309 U. S., *supra,* at pp. 425-427, 428-429), under the provisions of the Tariff Acts of 1930 and 1932 including Section 630 of the Revenue Act of 1932 added by the amendment of June 16, 1933, 48 Stat. 256, "relating to the entry of merchandise in bonded manufacturing warehouses, its manufacture there and its withdrawal from bonded warehouses for exportation or disposition as ships' stores" (at p. 425), that (*ib.,* pp. 425-426),

> "From the time of importation until the moment when the bunker 'C' oil is laden on vessels engaged in foreign trade, the imported petroleum and its product, the fuel oil, is segregated from the common mass of goods and property within the State, and

> is subject to the supervision and control of federal customs officers";[29]

and that it is thus *exclusively destined* for foreign commerce, and is not at any time available for sale or withdrawal in domestic commerce or for local or domestic consumption, at all. Reviewing those provisions, Congressional statutes and customs regulations under them, all manifestly enacted or adopted in the direct exercise of the power of the Congress under the commerce clause as regulations of foreign commerce, this court held that they manifested a Congressional intent wholly to exclude local State taxation of property thus exclusively held in the chain of foreign commerce under supervision of federal authorities. This court referred to the legislative history and the purpose of Section 630 of the Revenue Act of 1932, and said (309 U. S., *supra,* at p. 427):

> "The statutes and regulations taken together operate as regulations of foreign commerce, as the legislative history shows they were intended to do. * * *. The obvious tendency of the exemption, from the tax laid upon importation of crude petroleum, when it or its product is used for ships' stores by vessels engaged in foreign commerce is **to encourage importation of the crude oil for such use and thus to enable American refiners to meet foreign competition and to recover trade which had been lost by the imposition of the tax.** That tendency, and the tendency of the sale of tax-free fuel to vessels engaged in foreign commerce to promote the commerce, were considerations to be taken into account by Congress in fixing the terms of the statute, and its adoption as a means of regulating and promoting foreign commerce was within the Congressional

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[29] Whereas, with relation to deposits in "Class 2," "Importers Private Bonded Warehouses" (*Customs Regs.,* 1931, Art. 921; *ib.,* 1937, Art. 919), as in the present case, the federal government's only interest is in the collection of its customs. [22 Ops. Atty. Gen. 152; *ante,* p. 28.]

power. *Board of Trustees* vs. *United States,* 289 U. S. 48.

"That such was the purpose of the present legislation is confirmed by its history. Senate Report No. 58, 73d Cong., 1st Sess., on the bill which was enacted as Section 630 of the Revenue Act of 1932, exempting fuel placed on vessels engaged in foreign commerce from the tax, declared, page 3: 'It is believed that this amendment will **enable the American manufacturers to compete more favorably with their foreign competitors** for this business without any substantial loss of revenue, since the effect of the present law is to force purchases abroad.' "

E. Under those circumstances, and in view of that legislative history, and of the Congressional intent to aid American manufacturers in their competition with foreign manufacturers, this court concluded in that case (at pp. 428-429):

"In furtherance of that end Congress provided for the segregation of the imported merchandise from the mass of goods within the state, prescribed the procedure to insure its use for the intended purpose, and by reference confirmed and adopted customs regulations prescribing that the merchandise, while in bonded warehouse, should be free from state taxation. * * * . The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce."

F. **But in the present case the position is exactly reversed.** This was not crude oil brought into Puerto Rico to be manufactured. On the contrary, it was fuel oil already manufactured, and ready for consumption. The manufacturing had been done abroad,—in the Dutch colony of Aruba. The fuel oil was brought to Puerto Rico simply for sale, to whomsoever would buy. Under these circumstances, to say that, in case it shall be sold to American flag ships for consumption in their propulsion in domestic commerce between the Island and the mainland, then the uniform excise taxes laid by the insular laws on all sales in the

Island may not apply to it, simply because of the Congressional remission of tariff duties on oil sold for such purposes, *is not to further the purpose of the Congress* to aid American manufacturers in their competition with foreign manufacturers, *but is exactly the reverse.* As the insular Supreme Court said (R. 49; *ante,* p. 20), "To decide otherwise would be to make the Act discriminatory against the other merchants engaged in the same business". It would mean that, whereas the insular taxes continued to be levied on sales for such purposes of oil of domestic production,—for example, that manufactured into fuel oil in Texas, and brought from that State to Puerto Rico for sale,—yet the foreign manufactured oil would have to be exempted. The foreign manufacturer would be favored, at the expense of the American manufacturer. That was not the Congressional intent.

G. To say the least, there is here no necessary repeal by implication of the taxing powers which the Congress had expressly granted the local Legislature.

CONCLUSION

The judgment of the Circuit Court of Appeals, affirming that of the insular Supreme Court, was correct and should be affirmed.

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APPENDICES

APPENDIX I.

CONSTITUTION:

Article I, Section 10, Clause 2:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such laws shall be subject to the Revision and Control of the Congress.

Article I, Section 10, Clause 3:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article IV, Section 3, Clause 2:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

FEDERAL:

The Organic Act for Puerto Rico, Act of March 2, 1917, c. 145, 39 Stat. 951:

> [Sec. 1] That the provisions of this Act shall apply to the Island of Porto Rico and to the adjacent islands belonging to the United States, and waters of those islands; * * *.
>
> Sec. 2. That no law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the law. * * *
>
> That the rule of taxation in Puerto Rico shall be uniform.
>
> Sec. 3.—(*As amended by Act of Congress, approved March* 4, 1927.)—That no export duties shall be levied or collected on exports from Porto Rico, but

taxes and assessments on property, income taxes, internal revenue, and the license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Porto Rico; * * *

And it is further provided, That the internal-revenue taxes levied by the Legislature of Porto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island; *Provided,* That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico. The officials of the Customs and Post Services of the United States are hereby directed to assist the appropriate officials of the Porto Rican government in the collection of these taxes.

Sec. 7. That all property which may have been acquired in Porto Rico by the United States under the cession of Spain in the treaty of peace * * *, all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor works boards of Porto Rico, all the harbor shores, docks, slips, reclaimed lands, and all public lands and buildings not heretofore reserved by the United States for public purposes, is hereby placed under the control of the Government of Porto Rico, to be administered for the benefit of the people of Porto Rico; and the Legislature of Porto Rico shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable:

Provided, That the President may from time to time, in his discretion, convey to the people of Porto Rico such lands, * * *. And he may from time to time accept by legislative grant from Porto Rico any lands, buildings, or other interests or property which may be needed for public purposes by the United States.

Sec. 8. That the harbor areas and navigable streams and bodies of water and submerged land underlying the same in and around the Island of Porto Rico and the adjacent islands and waters, now owned by the United States and not reserved by the United States for public purposes be, and the same are hereby, placed under the control of the Government of Porto Rico, to be administered in the same manner and subject to same limitations as the property enumerated in the preceding section: * * *.

Sec. 9. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws: * * *.

Sec. 25. That all local legislative powers in Porto Rico, except as herein otherwise provided, shall be vested in a Legislature * * * designated "the Legislature of Porto Rico".

Sec. 37. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, * * *.

Tariff Act of 1930, Act of June 17, 1930, c. 497, 46 Stat. 590, 743, Secs. 555, 556, Title IV, p. 743; 19 U. S. Code, Pars. 1555 and 1556:

Sec. 555. Bonded Warehouses.

Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and

with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this Act, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse.

Sec. 556. Same—Regulations for Establishing.

The Secretary of the Treasury shall from time to time establish such rules and regulations as may be necessary for the establishment of bonded warehouses and to protect the interests of the Government in the conduct, management, and operation of such warehouses and in the withdrawal of and accounting for merchandise deposited therein.

CUSTOMS REGULATIONS, 1931:

Art. 312. Entry-Form and contents-Articles not entitled to entry.—(*a*) Tariff act of 1930, section 557:

> Any merchandise subject to duty, with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner, importer, or consigneed. • • •

(*b*) Entry for warehousing shall be made in triplicate on a form substantially in accordance with customs Form 7502.

(*c*) An importer must designate upon the entry

the bonded warehouse in which he desires his merchandise deposited and may designate thereon the bonded cartman or lighterman by whom he wishes the goods transferred. [Art. 317; 1937 Regulations.]

CLASSES OF CUSTOMS WAREHOUSES

Art. 921. Public stores and bonded warehouses—Classes 1 to 8. Class 1. Premises owned or leased by the Government and used for the storage of merchandise undergoing examination by the appraiser, under seizure or pending final release from customs custory, shall be known as a 'public store.' Unclaimed merchandise stored in such premises shall be held under 'general order.' Where such premises are not sufficient or available for the storage of seized and unclaimed goods, such goods may be stored in a warehouse of class 3. If there be no warehouse of that class, the collector may, with the approval of the bureau, rent suitable premises for the storage of seized and unclaimed goods.

Class 2. Importers' private bonded warehouses used exclusively for the storage of merchandise belonging or consigned to the proprietor thereof.

Warehouses of class 4 or 5 may be bonded exclusively for the storage of goods imported by the proprietor thereof, in which case they will be designated as 'importers' private warehouses.'

Class 3. Public bonded warehouses used exclusively for the storage of imported merchandise generally.

A warehouse of this class shall consist of an entire building, or a part of a building entirely separated from the rest of the building by suitable partitions or walls.

Class 4. Bonded yards or sheds for the storage of heavy and bulky imported merchandise.

Warehouses of this class shall be used exclusively for the storage of heavy and bulky articles. If the collector deems it necessary yards must be inclosed by substantial fences, with entrance gates capable of being secured by customs locks.

The collectors may send to such yards unclaimed or seized goods of a character above described.

Stables or parts thereof may be bonded upon approval of the bureau for the storage of animals.

Class 5. Bonded bins or parts of buildings or of elevators to be used for the storage of grain. The bonded portions must be separate from the rest of the building.

Class 6. Warehouses for the manufacture in bond, solely for exportation, of articles made in whole or in part of imported materials or of materials subject to internal-revenue tax; and for the manufacture for home consumption or exportation of cigars in whole of tobacco imported from one country.

Class 7. Warehouses bonded for smelting and refining imported ores and crude metals for exportation or domestic consumption.

Class 8. Bonded warehouses established for the purpose of cleaning, sorting, repacking, or otherwise changing in condition, but not manufacturing, imported merchandise, under customs supervision and at the expense of the proprietor.

A warehouse of this class shall consist of an entire building or a part of a building entirely separated from the rest of the building by suitable partitions or walls. Warehouses of class 1 and storage warehouses of classes 2, 3, 4, 5, and 6 may be designated as 'constructive manipulation warehouses' when the exigencies of the service so require. [Art. 919; 1937 Regulations.]

MANUFACTURING WAREHOUES

Art. 949. Manufacturing in bond authorized.—Tariff act of 1930, section 311:

> All articles manufactured in whole or in part of imported materials, or of materials subject to internal-revenue tax, and intended for exportation without being charged with duty, and without having an internal-revenue stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated

in Treasury Regulations as bonded warehouses, class six: *Provided*, That the manufacturer of such articles shall first give satisfactory bonds for the faithful observance of all the provisions of law and of such regulations as shall be prescribed by the Secretary of the Treasury: *Provided further*, That the manufacture of distilled spirits from grain, starch, molasses, or sugar, including all dilutions or mixtures of them or either of them, shall not be permitted in such manufacturing warehouses.

Whenever goods manufactured in any bonded warehouse established under the provisions of the preceding paragraph shall be exported directly therefrom or shall be duly laden for transportation and immediate exportation under the supervision of the proper officer who shall be duly designated for that purpose, such goods shall be exempt from duty and from the requirements relating to revenue stamps. * * * .

The provisions of section 3433 of the Revised Statutes shall, so far as may be practicable, apply to any bonded manufacturing warehouse established under this act and to the merchandise conveyed therein. [Art. 969; 1937 Regulations.]

Art. 960. Withdrawal for exportation of articles manufactured in bond.—(*a*) Tariff act of 1930, section 311:

* * * * *

Articles or materials received into such bonded manufacturing warehouse or articles manufactured therefrom may be withdrawn or removed therefrom for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Philippine Islands under the supervision of the officer duly designated therefor by the collector of the port, who shall certify to such shipment and exportation, or ladening for transportation, as the case may be, describing the articles by their mark or otherwise, the quan-

tity, the date of exportation, and the name of the vessel: *Provided,* That the by-products incident to the processes of manufacture * * * .

(*b*) Except cigars manufactured in bond, and supplies for vessels, no articles or materials received into a bonded manufacturing warehouse or articles manufactured therefrom, shall be withdrawn or removed therefrom, except for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries, or to the Philippine Islands, under the supervision of a customs officer. [Art. 980; 1937 Regulations]

PUERTO RICO:

Internal Revenue Law of Puerto Rico, as amended by Act No. 17 of June 3, 1927; Laws of 1927, Special Session, pp. 458-486.

Sec. 62. There shall be levied and collected, once only, on the sale of any article the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, and at the time of sale in Porto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale. (pp. 472-474).

Sec. 16 (*a*). There shall be levied and collected, once only, on all articles included in section 62 of this Act, a tax of two (2) *per centum ad valorem,* as provided in section 4 hereof, when said articles are manufactured, produced or introduced in Porto Rico for domestic use or consumption; but payment shall be made before said articles are withdrawn from the factory or from the custody of the post office or customs authorities, or from the express or steamship agencies, in such manner as the Treasurer of Porto Rico may by regulation prescribe (p. 484).

APPENDIX II

Copy of "Point V" of Respondent's Brief in *Bacardi Corporation of America* vs. *Manuel V. Domenech, Treasurer of Puerto Rico and Destileria Serralles, Inc.*, Case No. 21 at the present October Term, 1940, of this Court.

Point V

The commerce clause is not applicable to Puerto Rico. It relates only to commerce "among the several States" of the Union.

A. The Circuit Court of Appeals for the First Circuit said in *Lugo* vs. *Suazo*, 59 F. (2d) 386, 390, June 7, 1934 [followed in its opinion in the present case; R. 435-436; 109 F. (2d) 57, 62-63]:

> **"The commerce clause does not extend to Puerto Rico."**

B. The language of the commerce clause is (Clause 3, Section 8, Article I):

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

C. Manifestly, that language relates only to the States of the Union, and to commerce among themselves and with foreign nations and with the Indian tribes. The Circuit Court was plainly correct, therefore, in its holdings in the *Lugo* vs. *Suazo case, supra*, and in the present case, that the commerce clause does not extend to Puerto Rico.

D. It follows that the District Court was in error in holding in this case that the Acts of the Legislature of Puerto Rico here involved are violative of the commerce clause of the Constitution (R. 104-105, 116 ["14"]; and that the Circuit Court of Appeals was right in overruling the District Court, in this respect. The commerce clause is not here involved.

E. The constitutional relation between the legislative jurisdiction of the Congress and that of the Legislature of Puerto Rico is vitally different in this respect from the Constitutional relation between the legislative jurisdiction of the Congress and that of the State legis-

latures. In determining the validity of a Puerto Rican statute the question is not whether it invades the commerce clause, or invades powers which, with relation to the States, are exclusively vested in the Congress; but the test is simply whether it exceeds the powers granted to the Puerto Rican Legislature by the Organic Act and other Acts of Congress.

F. Puerto Rico is not a "State" within the meaning of that term as it is employed in the commerce clause and elsewhere in the federal Constitution, as, for example, in the Fourteenth Amendment.

Puerto Rico is a Territory of the United States; an organized Territory, although not yet formally "incorporated" into the Union. *People vs. Shell Co., supra,* 302 U. S. 253, 257-259. In legislating with respect to Puerto Rico the Congress acts by virtue of the authority given it by Article IV, Section 3, clause 2, of the federal Constitution, "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States". The federal Constitution applies to Puerto Rico in a general sense only,—in the sense that, as was observed by CHIEF JUSTICE TAFT in the *Balzac* case (*Balzac vs. People of Porto Rico,* 258 U. S. 298, 312):

> "The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted. * * *. The Constitution, however, contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements."

Many of its provisions are inapplicable in or to Puerto Rico, either because of express terms that limit their application to the States [such as the commerce clause and the Fourteenth Amendment] or to other subjects not pertinent

in any way to the Territories, or to a Territory such as Puerto Rico not yet formally "incorporated" into the Union; or because, not being in their nature among those clauses which embody "guaranties of certain fundamental personal rights declared in the Constitution" [*Balzac vs. Porto Rico, supra,* 258 U. S. 298, 312], some of the provisions of the Constitution do not limit the action of the Congress in legislating, under Article IV, for the "Territory or other Property belonging" to the United States. For example, this Court has held inappplicable in or to Puerto Rico the provisions of the Fifth Amendment prohibiting criminal prosecutions without prior indictment (*Porto Rico vs. Tapia* and *Porto Rico vs. Muratti,* 245 U. S. 639), the provisions of the Sixth Amendment guaranteeing the right of trial by jury (*Balzac vs. Porto Rico, supra,* 258 U. S. 298), the provisions of Article I, Section 8, Clause 1, requiring that all duties, imposts and excises shall be uniform throughout the United States (*Downes vs. Bidwell,* 182 U. S. 244), and the provisions of Article I, Section 9, Clause 5, that no tax or duty shall be laid on articles exported from any State (*Dooley vs. United States,* 183 U. S. 151).

G. Of course, with respect to the regulation of commerce between Puerto Rico and the States, as well as between Puerto Rico and other Territories, and with foreign nations, the Congress possesses, under the "territorial clause" above mentioned (Article IV, Section 3, Clause 2), the same complete and exclusive powers it possesses, under the "commerce clause", with relation to interstate commerce between the States of the Union. *There remains, however, a sharp distinction between the principles involved,* on the one hand, in a determination whether a statute of a State invades the exclusive power of the Congress under the commerce clause of the federal Constitution and other clauses relating to the States of the Union, and, on the other hand, those principles affecting a determination of the ques-

tion whether a statute of the Puerto Rican Legislature exceeds the powers which the Congress has granted to that body by the Organic Act.

This is because, in the case of Puerto Rico, the Congress has by the Organic Act (Secs. 25 and 37, Act of March 2, 1917, 39 Stat. 951, 958, 964; Appendix to Suggestions in Opposition, p. 55) delegated all of its own local legislative powers with respect to that Island to the insular Legislature, except as otherwise prescribed or limited by that Act or other acts of the Congress.

It follows that *the Legislature* of Puerto Rico, *in legislating locally* for the government and the people of Puerto Rico *can do anything which the Congress itself could do,* except in so far as otherwise limited by the Organic Act or other acts of Congress. *Haavik vs. Alaska Packers Association,* 263 U. S. 510, 514; *Rafferty vs. Smith, Bell & Co.,* 257 U. S. 226, 232; *United States vs. Heinszen & Co.,* 206 U. S. 370, 385-386; *People vs. Shell Co., supra,* 302 U. S. 253, 259 *et seq; People of Puerto Rico* vs. *Rubert Hermanos, Inc., supra,* 309 U. S. 543, 547-549.

H. Hence **The Legislature of Puerto Rico** in legislating, as in the Acts here in question, in the exercise of its police powers, for the public welfare of Puerto Rico, the protection or development of its local industries, or for the health or welfare of its people, is, in so far as the "commerce clause" is concerned, **or in so far as commerce between Puerto Rico and the States or foreign nations is concerned, restrained only by the provisions of the Organic Act, or other pertinent acts of Congress, if any;** and is not, as is the legislature of a State, confronted with the barrier of exclusive jurisdiction over interstate commerce vested in the Congress by the "commerce clause" of the Constitution.

I. Any question of whether a Puerto Rican statute affecting overseas commerce with the Island, or between the Island and the mainland, or with other Territories, is invalid because of supposed conflict with the legislative juris-

diction of the Congress, is to be determined, not by any reference to the commerce clause of the federal Constitution and the many judicial interpretations of that clause and its bearing on State statutes, but, on the contrary, is to be determined solely by reference to the powers and limitations of the Puerto Rican Legislature prescribed by the Organic Act and other acts of the Congress.

J. Direct regulation of interstate commerce is a field of legislative jurisdiction barred to the States of the Union by the commerce clause of the federal Constitution. It is a field into which they cannot enter, even where it has been left unoccupied by the Congress, excepting in so far as they are permitted to impose reasonable regulations in the exercise of their legitimate police powers. On the other hand, in the case of the Legislature of Puerto Rico, the situation is exactly reversed. In the latter case, the Congress having extended a general grant of all of its own local legislative powers to the Puerto Rican Legislature, subject only to specified statutory exceptions and limitations, the Legislature can enter into and occupy any part of the field from which it is not excluded by some express provisions of the Organic Act, or by some other act of Congress, if any there be, limiting its powers in the direction in question. *People of Puerto Rico* vs. *Shell Co., supra,* 302 U. S. 253, 259-263; *People of Puerto Rico* vs. *Rubert Hermanos, Inc., supra,* 309 U. S. 543, 547-549.

K. Petitioner suggests (*Brief,* p. 61) that the words "the several States" in the Constitution may be construed to include "Territories". But its citations fail to support the suggestion. For instance, it cites *Talbott* v. *Silver Bow County,* 139 U. S. 438, 444. But that case holds simply (at pp. 443-444) that, inasmuch as Section 6 of the National Bank Act of 1864 (c. 106, 13 Stat. 99, 101; reenacted in Rev. Stats., Sec. 5134) providing the places where national banks might be organized, provided for

them in "any State, *Territory or district*" [*italics supplied*], therefore, a subsequent taxing section of the Act should be construed as extending also to the Territories, because, as the court there said:

> "Further it is a general rule in the construction of statutes that when in the earlier and declaratory sections the scope and extent of the power and privileges granted are once stated, the character of the grant as thus disclosed controls and interprets all subsequent sections; and it is unnecessary in each subsequent section to restate or use words and expressions which shall fully disclose the extent of those powers and privileges".

PETITION FOR REHEARING

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1940

No. 26

WEST INDIA OIL COMPANY (PUERTO RICO),
Petitioner,

vs.

MANUEL V. DOMENECH, Treasurer of Puerto Rico
(Substituted for Rafael Sancho Bonet),
Respondent.

PETITION FOR REHEARING.

JAMES R. BEVERLEY,
Attorney for Petitioner.

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PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

West India Oil Company (Puerto Rico) respectfully petitions the Court for a rehearing in this cause, the decision in which was entered by this Court on November 12th, 1940.

As basis for the rehearing requested, petitioner submits the following:

I.

The words "brought into" used in the Act of Congress of March 4, 1927, as applied to foreign merchandise, should not be given any broader significance than the word "import".

The opinion of this Court in this case assumes without discussion that the words "brought into the Island", as used by Congress in the Act of March 4, 1927 (44 Stat. 1418), have a broader and different significance as applied to foreign merchandise than the word "import" would have. It is clear from all the authorities cited under Point I in the Brief for Petitioner dated September 16, 1940, that foreign goods are not "imported" in the technical and legal sense until they are released from Customs custody to the owner or importer. While goods are in the custody of the officers of the United States Customs they are *in process* of importation, but they are not "imported". Compare *Fabbri* v. *Murphy,* 95 U. S. 191, 197; Treasury Decisions 21158 (1899); 14 Opinions Attorney General of the United States 574; 21 Id. 233; 27 Id. 440; *Lawder* v. *Stone,* 187 U. S. 281, 284, 286; 17 Corpus Juris 552.

The decision in this case by the Circuit Court of Appeals (108 Fed. (2) 144) did not turn on the meaning of the Act of Congress of March 4, 1927 nor was that point discussed by that Court. Nor did the Supreme Court of Puerto Rico in its opinion refer to the significance of the language of the amendment to the Organic Act of Puerto Rico made by the above mentioned Act of Congress of March 4, 1927. Nor was the question of the significance of the language in the said Act of Congress briefed by either party below.

The brief of respondent in the hearing in this Court was available to counsel for petitioner only a few days before

the argument on October 23rd, 1940, and after petitioner's brief had been filed; and the emphasis upon the wording of the above referred to Act of Congress of March 4, 1927 as decisive of this case, came as a surprise to petitioner.

Petitioner submits that further consideration should be given to the origin and background of the Act of Congress of March 4, 1927. In 1923, by Act No. 68 of the Legislature of Puerto Rico, approved July 28th, 1923, the Legislature of Puerto Rico had passed a new and extended Excise Tax Law. This new tax law was attacked in the courts by various taxpayers who brought suits for injunctions. In the Annual Report of the Governor of Puerto Rico for the fiscal year ended June 30th, 1925 (printed as House Document No. 220, House of Representatives of the United States, 69th Congress 1st session), reference is made on pages 4 and 5 to the Excise Tax Law of 1923 as follows:

> "The opposition took the form of litigation contesting the validity of the taxes levied and *a great many injunctions were issued* by the courts, especially by the United States District Court. As a result a large part of the revenue was tied up in the courts . . . These cases are now pending on appeal. In others the decisions of like issues in the States have uniformly sustained such laws. It is not probable that different rules will be adopted in Puerto Rico." (Italics supplied.)

As far back as 1925, it will be seen from the above that the difficulties experienced by the Insular Government were thought to be principally due to the issuance of injunctions.

In the Annual Report of the Governor of Puerto Rico for the fiscal year ended June 30, 1926 (House Document No. 614, 69th Congress, 2nd session), reference is again made to the tax suits.

> Page 8.—"The controversy regarding taxes referred to in previous reports, still continues, although

> the court decisions sustaining the validity of the law have largely settled the legal objections."
>
> Page 53.—"There are appealed from the municipal courts fifty-three cases to recover excise taxes paid under protest and sixty-four cases appealed to the United States Court of Appeals; *fifty-five injunction cases are pending* contesting the validity of the Excise and Sales Tax Laws." (Italics supplied.)

The quotation just ended refers largely to injunctions and other cases brought against the second Excise Tax Law of Puerto Rico approved in 1925 (Act No. 85 of the Legislature of Puerto Rico approved August 20th, 1925), which is the very Act involved in the present suit.

After the Report of the Governor of Puerto Rico for the fiscal year ended June 30th, 1926, and on March 4, 1927, Congress enacted an Act which amended Section 3 of the Organic Act of Puerto Rico and *also Section 48 of the Organic Act* (44 Stat. 1418, 1421; U. S. Code, Title 48, 741(a), 872). So far as the questions here involved are concerned, the amendments made by the Act of Congress read in their pertinent part as follows:

> ". . . and it is further provided that the internal revenue taxes . . . may be levied and collected . . . on the articles subject to said tax as soon as the same are manufactured, sold, used *or brought into* the Island . . .
>
> "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico." (Italics supplied.)

In the Annual Report of the Governor of Puerto Rico for the fiscal year ended June 30, 1927 (House Document

No. 121, 70th Congress, 1st session), at page 23, the Governor commented on this Act as follows:

> "In previous Reports it has been explained that a concerted attack by some large corporations, partnerships and individual taxpayers against the Revenue Laws of the Island was commenced several years ago and has continued since. It was for some years impossible to collect all the taxes levied because of injunctions issued by the courts prohibiting the collection of the revenue necessary to carry on the Government. * * * *Congress relieved the situation by giving Puerto Rico the benefit of the law in force in the United States, by which the courts are prohibited from issuing injunctions* preventing the collection of the taxes necessary to carry on the Government. This law was made applicable to Puerto Rico and prevents the further issuance of such injunctions by the United States District Court." (Italics supplied.)

From page 50 of the same Report, the following is taken:

> "It is a notable achievement in legislation to have obtained during the year from both the Congress of the United States and from the Legislature of Puerto Rico laws *forbidding the United States Court of Puerto Rico and the insular courts from hereafter issuing injunctions* preventing the Government of Puerto Rico from collecting its taxes levied by law. This places Puerto Rico in harmony with the laws of the States in that respect." (Italics supplied.)

Meanwhile a considerable number of injunction cases against the Excise Tax Laws of Puerto Rico had come up on appeal to the United States Circuit Court of Appeals for the First Circuit and that Court, in Puerto Rico Tax Appeals (*Insular Motor Corporation* v. *Gallardo, Treasurer,* and 42 other cases), 16 Fed. (2) 545, decided January 7th, 1927, held in general as follows: That the legal remedy of the taxpayer being doubtful, equity had jurisdiction to *en-*

join collection of the taxes *and that the Original Package Doctrine* stemming from *Brown* v. *Maryland,* 12 Wheat. 419, *was applicable to* importations from foreign countries into Puerto Rico and that, therefore, the excise tax of Puerto Rico could not be made effective on the first sale of foreign goods by the importer in Puerto Rico in the original packages. The Court said in this connection (16 Fed. (2) at page 549):

> "*Brown* v. *Maryland* is applicable to importations from foreign countries sold by the importers in the original packages, and the taxes as to such importations so sold must be enjoined. But the invalidity of such taxes does not affect other taxes * * * Sales of such goods, not by the importers in the original packages, are taxable * * * The right of Puerto Rico to tax the sales of foreign importations is not greater than the corresponding right of a State."

In the Senate Report upon the Act of Congress of March 4th, 1927 (Senate Report No. 1011, 69th Congress, 1st session, p. 2), in explaining the necessity for the amendment to Section 3 of the Organic Act, it is said in part:

> "In other words, the courts have held that the internal revenue tax cannot be collected while the article subject to the tax is in the original package * * * For the purpose of righting this situation a new provision is added to Section 3, etc."

Petitioner submits that the history and background of the Act of Congress of March 4, 1927 show that it was intended to do only two things:

(a) To prohibit the Federal Court in Puerto Rico from issuing injunctions against taxes, and

(b) To allow the excise taxes of Puerto Rico to be made effective on the first sale of foreign goods even

in the original package, in other words, eliminating the Original Package Doctrine so far as Puerto Rican excise taxes are concerned.

There is no indication anywhere that it was expected or intended to change the long-known rule that foreign goods in the process of importation and still in the custody of the Customs officers are exempt from all local taxation of every kind. The Customs Regulations of 1937, Article 258, state that

> "Hawaii and Puerto Rico are customs-collection districts and are subject to all the provisions of the Customs Laws and Regulations of the United States * * *"

The marginal note to this paragraph carries the following citations: Act of April 12, 1900, Section 4; T. D. 19668, 22198, 24692, 45768.

Petitioner further submits that in the Act of March 4, 1927 Congress used the words "brought into" only in order to cover both foreign and continental merchandise and thus to avoid the necessity of using a double phrase such as "imported from abroad or brought into the Island from the United States". Had Congress used the word "imported" alone at this point, it would have caused confusion from the fact that technically the word "import" always refers to *foreign* merchandise, *Lawder* v. *Stone, supra,* and in such case Puerto Rico would have been in the peculiar position of being able to tax foreign goods in the original package but possibly not so goods from the United States. There is no evidence in the history of the Act of March 4, 1927 to indicate that Congress intended the words "brought into" to mean other than imported so far as foreign merchandise is concerned, and consequently goods are not "brought into" the Island until they have passed from the control and

custody of the United States Customs officers to the control and custody of the owner.

Had such a radical change in the situation of Puerto Rico been intended as is now indicated by the decision of this Court of November 12th, 1940, whereby Puerto Rico can interfere at will with foreign merchandise in the hands of the United States Customs authorities by tax measures, it would seem that there would have been comment on the change both in Congress and in the Reports of the Governor of Puerto Rico. Petitioner submits that the most logical meaning to be given to the words "brought into" the Island as applied to foreign merchandise would be the same as that given to the word "import" in other circumstances, *i. e.*, "brought into" the hands of the person or persons to be taxed; not poised, so to speak, at the United States tariff boundary, where technically and for the purposes of local jurisdiction they cannot be said to be "in".

II.

The last sentence of Section 1, 44 Stat. 1418, does not add anything to the remainder of the act so far as this case is concerned.

By the last sentence of U. S. Code, Title 48, Section 741(a), the officials of the Customs and Postal Services of the United States are directed to assist the appropriate officials of the Insular Government in the collection of taxes. Heretofore this has uniformly been taken to mean the furnishing of pertinent information to insular officials as to quantity and kind of articles brought in and declared valuations. It has never been thought, prior to the decision of the present case, that the direction to the Customs and Postal

authorities extended the jurisdiction of the Insular Government. To extend the jurisdiction of the Insular Government to include merchandise actually under the control and custody of federal officials, would ordinarily seem to require very plain language indicating such intention.

III.

Section 309 of the Tariff Act of 1930 specifically refers to ships engaged in trade between the United States and any of its possessions.

It is undoubted, as was held by this Court in *McGoldrick* v. *Gulf Oil Corporation*, 84 Law. Ed. 597, that Congress has undertaken to regulate the taxation of ships' supplies in certain cases. When Congress, in Section 309 specifically refers to the exemption from duty or internal revenue tax for supplies to vessels engaged in trade between the United States *and any of its possessions*, petitioner submits that Congress clearly declared its intention to bring such trade within exactly the same purview as trade between the Continental United States and foreign countries and between the Atlantic and Pacific ports of the United States. It is difficult to see how Congress could have expressed its intention in clearer language than it did. The statement made by the Committee in reporting the 1933 amendment to the Revenue Act of 1932 (Senate Report No. 58, 73rd Congress, 1st session, May 1st, 1933) and the remarks by Senator Harrison and Senator Reed (Congressional Record, May 11th, 1933, page 3262) quoted in Petitioner's brief, pages 27 and 28, indicate the intention of Congress to relieve ships' supplies of tax and to extend the federal protection to such trade. No indication is found that it was expected or intended that Puerto Rico world be an exception to the gen-

eral rule, in fact, the necessity for such protection in the trade between Puerto Rico and the Continental United States and foreign countries and the reasons for such protection are exactly as great as in any other case. The tax here concerned by the Insular Government is as much a direct interference with the regulation by Congress of trade between the United States and its possessions as the New York City tax in *McGoldrick* v. *Gulf Oil Corp.* was as to foreign trade. In the face of the explicit reference in Section 309 of the Tariff Act of 1930 to trade between the United States and its possessions and considering the history and background of the so-called Butler Act of March 4, 1927, there is no necessity of considering the question of repeal by implication.

IV.

The implication from the Opinion of this Court in this case would seem to be that Puerto Rico, under the Butler Act of March 4, 1927, may now tax sales for export.

Title 48 U. S. Code, Section 741, prohibits export duties on exports from Puerto Rico, but if *sales for export* can be taxed because of the present interpretation of the Butler Act, then Puerto Rico can do indirectly what it is forbidden to do directly, and the Butler Act operates as an implied repeal of the prohibition against export duties in 48 U. S. Code 741.

V.

The decision of this case creates an anomalous situation as between Puerto Rico and other possessions and parts of the United States.

Lying hard by Puerto Rico and just to the east, almost in sight of the shores of Puerto Rico, are other "possessions" of the United States. They are the Virgin Islands, with a good harbor and fueling facilities. Since the so-called Butler Act (the Act of Congress of March 4, 1927) does not apply to the Virgin Islands nor to any other part of the United States except Puerto Rico, an anomalous situation is presented by the interpretation given by the Court to the Act of March 4, 1927. Presumably under the decision of *McGoldrick* v. *Gulf Oil Corporation,* the Virgin Islands government could not under the circumstances of this case, lay any local tax on the fuel oil for ships' bunkers, while Puerto Rico can. It does not seem reasonable nor logical that Congress intended to give ships' suppliers in the Virgin Islands a competitive advantage over their competitors just across the passage. The Tariff Act of 1930 and the Revenue Act of 1932 would rather seem to manifest an intention to protect *all* American ship suppliers equally.

The practical reasons for the protection of ships' suppliers in Puerto Rico by Congress are as imperative as in any of the other areas that are protected under the decision in *McGoldrick* v. *Gulf Oil Corporation,* if not more so. Ships trading between Puerto Rico and foreign countries of course may fuel in the foreign countries; but also ships plying between Puerto Rico and the Florida and Gulf Coast ports of the United States pass along the coasts of three foreign countries, all with excellent ports and fueling facilities. Ships trading between Puerto Rico and more northern conti-

nental ports pass within easy striking distance of British islands.

But regardless of the Virgin Island ports and foreign ports where ships trading to Puerto Rico may fuel, *all the ports of the United States* outside of Puerto Rico enjoy a competitive advantage in fueling ships over Puerto Rico as a result of the combined effect of the Gulf Oil decision and the decision in the present case. Ships trading to Puerto Rico may now all fuel in New York, Baltimore or New Orleans free of state or local tax, while if they fuel in Puerto Rican ports an Insular tax will be collected. It is instantly clear where ships will fuel in the future, or rather where they will *not* fuel. It is respectfully submitted that Congress did not intend any such inequitable result.

VI.

Doubtful tax statutes are generally construed to favor the taxpayer.

Petitioner appeals finally to the long established rule that in case of doubt in the construction or application of tax statutes, the construction most favorable to the taxpayer is given. *Gould* v. *Gould,* 245 U. S. 151; *United States* v. *Field,* 255 U. S. 257; *United States* v. *Isham,* 17 Wall. at page 504; *Reinecke* v. *Trust Co.,* 278 U. S. 340; *Old Colony Railroad Co.* v. *Commissioner of Internal Revenue,* 284 U. S. 553; *United States* v. *Merriam,* 263 U. S. 179; *Bowers* v. *Lighterage Co.,* 273 U. S. 346; *United States* v. *Updike,* 281 U. S. 489; *Burnet* v. *Niagara Falls Brewing Co.,* 282 U. S. 648; *Hartranft* v. *Wiegmann,* 121 U. S. 609; *American Net & Twine Co.* v. *Worthington,* 141 U. S. 468.

In *United States* v. *Riggs*, 203 U. S. 136, 139, Justice HOLMES, remarking on the interpretation of parts of the Tariff Act, said:

> "You must not alter words in the interest of the imagined intent, and the importers are entitled to the benefit of even a doubt."

WHEREFORE, petitioner respectfully prays this Court to grant a rehearing in this case, with special reference to the meaning, interpretation and effect of that part of the Act of Congress of March 4th, 1927 which amended Section 3 of the Organic Act of Puerto Rico, or with argument otherwise limited as the Court may think proper.

Respectfully submitted,

JAMES R. BEVERLEY,
Attorney for Petitioner.

Certificate of Counsel.

I, JAMES R. BEVERLEY, of San Juan, Puerto Rico, attorney for the petitioner West India Oil Company (Puerto Rico), do hereby CERTIFY that I have prepared the foregoing Petition for Rehearing, that the said petition is presented to the Court in good faith and not for any purposes of delay.

San Juan, Puerto Rico, November 30th, 1940.

JAMES R. BEVERLEY.

pp. 2, 4

SUPREME COURT OF THE UNITED STATES.

No. 26.—October Term, 1940.

West India Oil Company (Puerto Rico), Petitioner, *vs.* Manuel V. Domenech, Treasurer of Puerto Rico.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[November 12, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The question is whether a Puerto Rico sales tax imposed by §§ 16(a), 62 of the Internal Revenue Act of Puerto Rico, (as amended by Act No. 17 of June 3, 1927, Laws of 1927, Special Session, pp. 458-486), is invalid because as applied it infringes Congressional regulations of foreign and domestic commerce effected by the tariff laws and customs regulations of the United States. The tax is challenged so far as it is laid on the delivery, in consummation of sales, of fuel oil which has previously been imported in bond and then withdrawn, duty free for delivery to vessels in Puerto Rican ports for use as fuel upon their voyages to ports of the United States or foreign countries. The Court of Appeals for the First Circuit has affirmed the judgment of the Supreme Court of Puerto Rico sustaining the tax, 54 P. R. Dec. 732 (Spanish edition). 108 F. (2d) 144. We granted certiorari, 309 U. S. 652, because the question presented is of importance in the administration of the customs laws of the United States and of the revenue laws of Puerto Rico, and because of an asserted conflict with our decision in *McGoldrick* v. *Gulf Oil Corporation*, 309 U. S. 414.

Petitioner brings fuel oil from a foreign country, where it is produced and refined, to Puerto Rico, where it is stored in bonded warehouses in the joint custody of petitioner and the customs officers of the United States, as provided by § 555 of the Tariff Act of 1930, 46 Stat. 743, 19 U. S. C. § 1555, and applicable customs regulations. From time to time petitioner withdraws some of the oil from bond, for disposition and use in Puerto Rico. Petitioner

also withdraws some of the oil, with which we are now concerned, and delivers it to vessels in Puerto Rican ports upon sales for use as ships' stores in the manner already indicated. Upon such withdrawal and delivery the import tax imposed on fuel oil by § 601(a)(c)(4) of the Revenue Act of 1932, 47 Stat. 169, 259-260, and required by § 601(b) to be "treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by . . . [the Tariff Act of 1930]" is remitted pursuant to § 309 of the Tariff Act of 1930, 46 Stat. 590, 690 and § 630 of the Act of 1932, added by the amendment of June 16, 1933, 48 Stat. 256.

Section 309 authorizes withdrawal from bonded warehouse, duty free under treasury regulations, of articles of foreign manufacture or production for use as ships' supplies, and §§ 601(b), 630 of the Revenue Act of 1932 extend the benefit of those provisions to fuel oil imported in bond and withdrawn and "sold for use as fuel . . . on vessels . . . engaged in foreign trade or trade . . . between the United States and any of its possessions". See *McGoldrick* v. *Gulf Oil Co., supra,* 423 *et seq.*

It is true, as petitioner urges, that in *McGoldrick* v. *Gulf Oil Company, supra,* we held that the provisions of the Tariff Act of 1930 and of the Revenue Act of 1932, and the customs regulations relating to bonded manufacturing warehouses, when applied to crude oil imported into New York and there manufactured into fuel oil in bonded warehouses and withdrawn duty free for sale as ships' stores, manifested an intention of Congress to regulate the foreign commerce involved, in the interest of and for the protection of American manufacturers, and that a state tax on the sale was invalid because in conflict with such regulation. We do not stop to consider whether, as respondent insists, a different result should be reached here because the imported oil was imported in its manufactured state and was not, as in the *Gulf Oil* case, earmarked for manufacture in bonded warehouse and withdrawn after manufacture for sale as ships' stores. We need not now determine whether standing alone the statutory characterization of the oil sold as ships' supplies as "exports" within the meaning of the customs laws, § 309(b) Tariff Act of 1930; § 630 of the Revenue Act of 1932, does more than make applicable to it the provisions of the Tariff Act of ~~1932~~ 1930 for remission of customs duties upon merchandise imported in bond and later exported. Nor is it necessary to examine the various arguments advanced that the tax, without the consent of Congress, is an

infringement of its constitutional power over commerce. For we think a sufficient answer to all the contentions of petitioner is to be found in the Congressional consent to the tax given by the March 4, 1927 amendment of § 3 of the Organic Act of Puerto Rico, 44 Stat. 1418.

Before the amendment, § 3 had prohibited duties "on exports from Puerto Rico", but had provided that "taxes and assessments on property, internal revenue" etc., "may be imposed for the purposes of the insular and municipal governments respectively, as may be provided and defined by the Legislature of Puerto Rico. . . ." Congress, by the amendment, added to § 3 a proviso "that the internal-revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax as soon as the same are manufactured, sold, used or brought into the island: *Provided* that no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Porto Rican government in the collection of these taxes."

The plain purport of the words of this proviso is that any tax authorized by the Organic Act with respect to articles of domestic production may likewise be levied with respect to imported articles "as soon as . . . [they] . . . are manufactured, sold, used or brought into the island" provided only that there be no tax discrimination between articles brought from the United States and foreign countries and domestic articles. The amendment seems to have been occasioned by doubts which had arisen whether merchandise brought to the Island from the United States was subject to local taxation while in the original package and also whether the merchandise has, while in the control of the customs authorities, the same status as respects local taxation as goods similarly controlled which have been imported from foreign countries and whether the power of the insular legislature to tax imports from foreign countries was any greater than that of the states which are forbidden, by Clause 2, of § 10 of Art. I of the Constitution, to tax imports and exports without the consent of Congress. S. Rept. No. 1011, 69th Cong., 1st Sess., p. 2. Cf. *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, with *Bald-*

win v. *Selig*, 294 U. S. 511, 526. These questions were involved in *Puerto Rico Tax Appeals*, 16 F. (2d) 545, decided January 7, 1927, shortly before the amendment of § 3 of the Organic Act. The judgments in that case were reversed and the suits ordered dismissed by this Court for want of jurisdiction October 24, 1927, after the amendment to the Organic Act of March 4, 1927, which deprived the federal courts of jurisdiction in the pending and other like suits to restrain the assessment and collection of Puerto Rico taxes.

Moreover practical difficulties appear to have been experienced in levying insular taxes upon goods on their arrival from the United States and while in the custody or control of postal or customs officers, due to the fact that the local tax while in its practical effect a customs duty was not collected by postal or customs officials. S. Rept. No. 1011, 69th Cong., 1st Sess. The doubts and the difficulty were removed by the amendment to § 3, giving the Congressional consent that articles should be subject to the taxing jurisdiction of the Puerto Rico legislature as soon as brought into the Island whether from the United States or from foreign countries, and directing that the United States customs officials and postal service should aid local officers in the collection of the tax. The effect of the broad language of the amendment was not only to subject to taxation all imported goods, whether from the United States or foreign countries, when brought into the Island in the original package, but to neutralize the regulatory effect of the customs laws and regulations in so far as they protected articles from local taxation after their arrival. Merchandise in the original package was thus subjected to tax when brought into the Island without regard to customs regulations. It would seem plain that other merchandise not in the original package was left in no more favorable situation and in the face of the broad and unambiguous language of the statute we cannot say that the one, more than the other, is immune from local taxation. Even if the oil sold as ships' stores were to be regarded as "exported", cf. *Swan & Finch* v. *United States*, 190 U. S. 143, 145; *United States* v. *Chavez*, 228 U. S. 525; *Cunard S.S. Co.* v. *Mellon*, 262 U. S. 100, the tax is one clearly within the terms of the proviso added to § 3 and so is one consented to by the United States.

The procedure for segregating imported merchandise in bond without payment of customs duties pending its withdrawal and shipment out of the country is old, long antedating the amendment of

§ 3 of the Organic Act. See *McGoldrick* v. *Gulf Oil Corp., supra.* The later Acts of 1930 and 1932 thus placed fuel oil so far as Puerto Rico is concerned, in the same category as other merchandise brought into the Island in the original package or in bond which, by virtue of the proviso of § 3 of the Organic Act was made subject to local taxation as soon as brought into the Island. The extension by Congress to fuel oil of the benefits of the customs laws and regulations affecting merchandise imported in bond did not imply that those laws and regulations were to be given any different effect in Puerto Rico than they then were permitted to have under § 3 of the Organic Act. In any event, considering the relationship of general Congressional legislation to legislation specifically applicable to our territories and possessions, repeals by implication are not to be favored and will not be adjudged unless the legislative intention to repeal is clear. *Posados* v. *National City Bank*, 296 U. S. 497, 501 *et seq.*

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 26.—October Term, 1940.

West India Oil Company (Puerto Rico), Petitioner, *vs.* Manual V. Domenech, Treasurer of Puerto Rico.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[November 12, 1940.]

Mr. Justice Reed, dissenting.

This judgment should be reversed on the authority of *McGoldrick* v. *Gulf Oil Corporation*, 309 U. S. 414. That case has just established the superiority of a federal statute for the protection of commerce over a state's right to levy a sales tax. In it we pointed out that it was inconsistent with the plenary power of Congress over commerce to permit local exactions to cut into the competitive advantages provided through the remission of customs duties to suppliers and exporters by the ship stores and fuel oil provisions of § 309 of the Tariff Act of 1930 and § 601(b) and § 630 of the Revenue Act of 1932. Congress authorized these advantages to give our ship chandlers opportunity to compete for this trade on an even basis with nonresidents. The *Gulf Oil* case held that imported fuel oil carried in New York bonded warehouses for export might be sold, under Treasury oversight, to noncoastwise shipping without payment of the city sales tax. The opinion demonstrated that the purpose of Congress would be thwarted if local taxation were permitted to interfere. The same holding in my opinion is required here.

Fuel oil imports into Puerto Rico are governed by the same tariff provisions, regulations for bonded warehouses and deliveries in bond to purchasers for use in overseas voyages as are those into the continental United States. The language of the Butler Act is held by the Court to require different treatment in New York or Puerto Rico of the same situation, despite the tax inequality produced between the respective taxing units. One would expect that Puerto

Rico would have no more authority than a state to levy a sales tax on bonded fuel oil but this Court's ruling permits it to tax where New York failed.

The authority is said to lie in the grant by Congress to Puerto Rico of the right to tax "as soon as the same [articles subject to tax] are manufactured, sold, used, or brought into the Island." As the fuel oil is brought into the Island, this Court's opinion concludes, it is taxable. The report upon the Butler Act points out the reason for its enactment.[1] It was to enable Puerto Rico to tax in the original package. It should take more than a general tax authorization to destroy the symmetry of the federal control over imports bonded for export and to permit local taxation in Puerto Rico of what is free from local taxation in New York. "Brought" should be construed to mean when goods pass from the customs control to private control, or the authority to tax of the Butler Act should be held to be subject to the federal power of tax exemption exercised generally in favor of fuel oil by § 309 of the Tariff Act of 1930 and § 601(b) and § 630 of

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[1] "In making use of the authority granted by section 3 to levy and collect internal-revenue taxes the government of Porto Rico has found itself unable to collect said taxes on articles purchased in and sent from the United States to Porto Rico by mail, or sometimes when said articles are sent by vessel, as the courts have held that the post-office or customs officials have no authority to withhold [the] delivery of such articles subject to the internal-revenue tax until the tax is paid, as such tax collected in this manner is in effect a customs duty. In other words, the courts have held that the internal-revenue tax can not be collected while the article subject to the tax is in the original package.

"This condition of affairs has practically nullified the power of the insular government to levy internal-revenue taxes, and therefore the efficacy of this sort of revenue has been seriously impaired.

"For the purpose of righting this situation, a new provision is added to section 3, which states as follows:

'*And it is further provided*, That the internal-revenue taxes levied by the Legislature of Porto Rico in pursuance of the authority granted by this act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island: *Provided*, That no discrimination in rates be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Porto Rican government in the collection of these taxes.'

"It is expected that the government of Porto Rico will so make use of this power as not to unnecessarily place any barriers in the way of the free-trade conditions now existing between [Porto Rico] and the mainland, which is the principal factor in the progress and prosperity of Porto Rico." (Senate Rep. No. 1011, 69th Cong., 1st Sess., p. 2.)

the Revenue Act of 1932. Since the right to tax imports in the original package, granted Puerto Rico by the Butler Act, merely makes goods in the original package in Puerto Rico taxable as other goods in the common mass of taxable property, the Butler Act gives to Puerto Rico no broader power to tax oil sales than was possessed by New York, by virtue of its sovereign power, in the *Gulf Oil* case *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33. Nothing requires us to frustrate the legislative policy of free competition in world markets.

The decree below should be reversed.

Mr. Justice ROBERTS joins in this opinion.